In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-806

A. BURTON HANKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL P. LIPTON
LIPTON & PETRIE, LTD.
625 North Milwaukee Street
Milwaukee, Wisconsin 53202

L. ARNOLD PYLE
WATKINS, PYLE, LUDLAM, WINTER & STENNIS
Post Office Box 427
Jackson, Mississippi 39201

JAMES S. NIPPES
DOSSETT, MAGRUDER AND MONTGOMERY
1800 Deposit Guaranty Plaza
Jackson, Mississippi 39201
Counsel for the Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Table of Authorities

Cases

Constitutional Provision

Texts

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

A. BURTON HANKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. BURTON HANKINS, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, officially reported at 565 F. 2d 1344, is printed in full as Appendix A. The supplemental clarifying opinion of the Court of Appeals, officially reported at 581 F. 2d 431, is printed in full as Appendix B. The District Court's Memorandum of Decision, officially reported at 424 F. Supp. 606, is printed as Appendix C. A copy of the District Court's order, committing appellant to the custody of the Attorney General, is printed as Appendix D.

The supplemental clarifying opinion of the Court of Appeals denied appellant's Petition for Rehearing En Banc with respect to affirmance of the contempt conviction, and denied appellant's Petition for Rehearing in the underlying appeal.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fifth Circuit were entered on January 12, 1978. The supplemental clarifying opinion of the Court of Appeals for the Fifth Circuit was entered on October 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was the target of a criminal tax investigation denied due process of law and unlawfully subjected to the trilemma of self-incrimination, perjury or contempt where the District Court, despite the absence of any showing that he was able to produce "missing records", committed the taxpayer to indeterminate incarceration because he relied upon his privilege against self-incrimination in failing to explain non-production of some of the records summoned by the Internal Revenue Service?

2. Alternatively, should the District Court have afforded the taxpayer a non-incriminatory opportunity to explain failure to produce where the taxpayer had moved to dismiss the contempt petition on the ground that he did not have custody or control of any "missing" records when the summonses were served?

3. Does the taxpayer's privilege against self-incrimination preclude the compulsory production, pursuant to an Internal Revenue Service summons, of the records of a business concededly operated by him as a sole proprietorship in the year following the death of the taxpayer's former co-partner?

4. Where a two-brother partnership was terminated and completely wound up after the death of one brother, and the surviving brother acquired by purchase unqualified ownership and unrestricted possession of the partnership assets prior to the issuance of an IRS summons calling for production of records of the former partnership, are such records protected against compulsory production by the taxpayer's privilege against self-incrimination?

5. Does the Fifth Amendment privilege protect the taxpayer against the incriminating testimonial implications involved in the attempted enforcement of various IRS summonses calling for the production of former partnership records, and records prepared by an accountant during the pendency of a will contest involving the deceased partner's estate, where such records were not being held in a custodial capacity and where the taxpayer denied that he had possession of some of the documents at the time the summonses were served?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The petitioner, A. Burton Hankins, is the principal target of a criminal tax investigation by the Intelligence Division of the Internal Revenue Service. Petitions to enforce various summonses issued to Hankins by a special agent in March, 1975, were filed in the District Court for the Northern District of Mississippi on November 28, 1975. Hankins appealed from orders enforcing the summonses, entered on August 10, 1976, but was denied a stay pending appeal.

On April 29, 1977, following a hearing on the Government's petition to hold Hankins in contempt, the District Court committed Hankins to the custody of the Attorney General for failure to produce certain "missing" records when he responded to the enforcement orders. The Court of Appeals granted a stay pending appeal, but affirmed all relevant orders in both appeals.

References to the appendix filed in the appeal of the summons enforcement orders will be designated as "App. I, ...". References to the appendix filed in the appeal of the contempt conviction will be designated as "App. II, ...".

The Underlying Facts

In 1957, the petitioner and his brother, Bewel Hankins, formed a partnership, Hankins Lumber Company, for the operation of a planing mill and lumber business. The partnership continued until the death of Bewel on November 19, 1971. (App. I, 79-80, 278) For the balance of 1971 and for all of 1972, Hankins operated the lumber business as a sole proprietorship, reporting the income from its operations as his own on his personal joint income tax returns. (App. I, 167, 446, 491; App. II, 122)

Bewel's will was admitted to probate and Burton was appointed executor on January 21, 1972. (App. I, 85-86) In August, 1972, Burton purchased a one-fourth interest in the former partnership from Bewel's widow, who had elected to take her statutory share. On October 18, 1972, the probate court granted Hankins' request to purchase from the estate the balance of his deceased brother's interest in the prior partnership. (App. I, 501-502)

A certificate of incorporation was issued for Hankins Lumber Company, Inc. on October 17, 1972. However, the corporation was not activated, no lumber business assets were transferred to the corporation, and no stock certificates were issued, until January 2, 1973. (App. I, 80-81)

During the pendency of an earlier will contest, an attorney representing Bewel's widow caused William S. Boswell, a C.P.A., to audit the financial affairs of her late husband, including the lumber company partnership. (App. I, 242-252, 418-420) In late March or early April, 1974, the attorney was requested to deliver the Boswell papers to Hankins. (App. I, 254)

On May 8, 1974, the estate was closed and Hankins was released and discharged as executor. (App. I, 86-87, 520-522) On July 2, 1974, possession and "all right, title, interest and ownership" in the Boswell files was obtained by Hankins pursuant to a letter which contained the written approval of Bewel's widow. (App. I, 90, 420-421)

The Income Tax Investigation

In January, 1973, an informant formerly employed by Hankins' certified public accountant made serious allegations to the Intelligence Division concerning the accuracy of the lumber company's 1971 records and income tax

returns. (App. I, 95, 180, 190, 192-193, 200, 223) Nevertheless, the investigation was assigned merely to a revenue agent from the Audit Division. (App. I, 165) After finding apparent discrepancies in the 1971 records, the revenue agent requested access to the 1972 records. (App. I, 167-168) However, Hankins' attorney denied the revenue agent's request to inspect the 1972 records in reliance upon his client's Fifth Amendment rights. The investigation thereafter was referred to the Intelligence Division. (App. I, 171-172, 229)

On March 10, 1975, Special Agent Grant issued a summons to A. Burton Hankins calling for the production of all records "pertaining to the Hankins Lumber Company partnership for the years 1968, 1969, 1970, 1971 and 1972." (App. I, 475) On March 25, 1975, Special Agent Grant issued a summons to Burton Hankins which called for the production of "all reports, documents, correspondence, workpapers, files and other data, related to an audit performed by William S. Boswell, Certified Public Accountant, of the records of the Hankins Lumber Company (a partnership at that time)". (App. I, 483)

When Hankins appeared in response to the above summonses, the special agent was informed that Hankins would not produce any documents or answer any questions in reliance upon his Fifth Amendment privilege. Grant thereupon terminated the meeting without placing Hankins under oath and without asking any questions. (App. I, 240-242)

The Enforcement Proceeding

Proceedings to enforce the foregoing and other IRS summonses were brought about nine months after service thereof. Hankins' verified answer to the petition seeking production of the former partnership records alleged that

he was unable to comply inasmuch as he did not have possession or control "of much of the record material which the Internal Revenue Service is attempting to summon." (App. I, 338) In his verified answer regarding a separate summons for estate papers, Hankins categorically denied the allegation that he had in his possession the documents demanded therein. (App. I, 389) In affidavits accompanying motions for summary judgment, Hankins admitted possession only of "existing" records and such records "as may be in my possession". (App. I, 35; R. 357, 488, 493)

At the enforcement hearing, Hankins' counsel asserted that it was premature to determine whether or not all of the records could be produced, and contended that this issue should be reserved for a contempt hearing in the event that the asserted legal defenses were overruled. (App. I, 58) Counsel advised the court that his position was supported by prior decisions. Neither Government counsel nor the District Court took issue with this contention.

During the above colloquy, the Court inquired whether Hankins had possession of all the summoned papers, except certain workpapers in the possession of his accountant. To this, counsel responded: "Such records as are in existence and were in existence at the time . . . the summons was served." (App. I, 59) The Government offered no proof that any of the summoned records were in existence or in the possession of Hankins at the time the summonses were served. (App. I, 41-269) Hankins was not called as a witness by the Government, nor did he testify in his own behalf.

Before the transcript was available, the Government submitted a proposed finding of fact that Hankins had "acknowledged to the court that he had in his possession,

in whatever capacity, the summoned records." The District Court adopted verbatim this totally unsupported finding. (App. C, p. A53)

The District Court's Orders

In the Memorandum of Decision entered July 15, 1976, the District Court ruled that Hankins' privilege against self-incrimination was not available to bar production of the "partnership records." The Memorandum further directed that an order be entered requiring Hankins "to produce the books and records of the Hankins Lumber Company partnership." (App. C, p. A62) Nothing was said therein concerning the 1972 records. The District Court also ruled that Hankins had sought and obtained the Boswell papers in his capacity as Executor, and that the papers were not privileged because they had been obtained in a representative capacity. (App. C, pp. A60-61)

Hankins was ordered to produce the summoned documents for "examination and copying", at a specified date. After the Government had an opportunity to inspect and copy the records, the orders required Hankins to appear before the special agent at a mutually agreeable date "for the purpose of giving testimony relating to the specified records and the tax liabilities under investigation". (App. I, 308-309, 342-343) On September 27, 1976, Hankins appeared before the special agent and produced various records for inspection and copying. (App. II, 60-64)

Following Hankins' appearance, letters were addressed to Hankins and his attorneys demanding production of various "missing" records, particularly pages from the partnership books for the period ended November 21, 1971, and the "Boswell audit report". (App. II, 19-23) *No demand was made for the production of records of the lumber business for any period subsequent to Bewel's death.*

Counsel for Hankins responded to both letters, stating that Hankins did not have custody, possession, or control of any of the documents specified as "missing" and suggesting that further inquiry be made when Hankins appeared for the purpose of "giving testimony". (Supp. R. 19-21; Dkt. No. 77-1967) Hankins was never directed to make the suggested appearance, a procedure plainly required by the District Court's orders. (App. I, 309, 343, 372, 403)

The Contempt Proceeding

On March 16, 1977, the Government filed a petition to hold Hankins in contempt for failing to produce the documents described in the above mentioned correspondence. (App. II, 1-3, 15-23) Petitioner moved to dismiss the contempt petition on the ground that he was unable to produce any of the "missing" records. (App. II, 28) Responding to this motion, the Government conceded that it could "offer no proof that Hankins is still in possession" of any "missing" records. (Memorandum in Opposition, p. 7; R. 55)

At the contempt hearing, the Government presented no evidence regarding existence and possession of the summoned records. Moreover, the District Court declined to permit cross-examination of the special agent concerning his knowledge as to possession and existence of the records at the time the summonses were served. (App. II, 73-76, 80-81, 82)

When the Government rested, the District Court was advised that Hankins was prepared to testify under oath that he did not have possession, custody or control of the documents alleged to be "missing", and that he was unable to produce the same on the dates the summonses were served. However, counsel requested a preliminary

ruling that Hankins would not thereby waive his privilege and be compelled to respond to cross-examination regarding the whereabouts and disposition of nonproduced records. (App. II, 86) The Court refused to so rule and stated that Hankins would be directed to respond if he exercised his privilege against self-incrimination upon cross-examination. (App. II, 85-86)

Counsel for Hankins thereupon made an offer of proof to the effect that Hankins would testify that he was unable to produce any of the "missing" records, and that he did not have possession, custody or control of the same when the summonses were served. An affidavit to this effect, signed by Hankins, was attached to his Motion for Stay Pending Appeal.

After Hankins rested without offering any testimony or further evidence, the District Court stated: (App. II, 97)

> "In view of the fact that he has refused to present any evidence, I don't see anything I can do but hold him in contempt of court and order him committed to the custody of the Attorney General".

REASONS FOR GRANTING THE WRIT

1. The decision below violates the basic holdings of this Court in *Curcio* v. *United States,* 354 U.S. 118 (1957), and *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964). Moreover, the holding of the court below is in essential conflict with the decisions of the Courts of Appeal for the Second Circuit in *United States* v. *Patterson,* 219 F. 2d 659 (2d Cir. 1955), and the District of Columbia Circuit in *Traub* v. *United States,* 232 F. 2d 43 (D.C. Cir. 1955).

2. The holding in *Curcio* v. *United States,* 354 U.S. 118 (1957), that the custodian of non-privileged records may not be compelled to testify concerning their whereabouts and disposition, will become meaningless if incarceration may be used to compel incriminating testimony in exchange for freedom. Clarification is needed to protect the erosion of Fifth Amendment rights by use of the subpoena *duces tecum* to coerce testimony from the target of a criminal investigation.

3. The coercive incarceration of the target of a criminal tax investigation, without affording him a non-incriminating opportunity to explain a failure to produce records, violates the fundamental principle that the Fifth Amendment should protect one suspected of crime from being subjected to the "cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55 (1964).

4. The holdings below conflict with the mandate of this Court in *Maggio* v. *Zeitz,* 333 U.S. 56 (1948), that coercive imprisonment for contempt is improper in the absence of convincing proof of ability to comply with a court's order. See also *McNeil* v. *Patuxent Institution Director,* 407 U.S. 245, 251 (1972).

5. The holding below fails to extend Fifth Amendment protection to the records of a business concededly operated as a sole-proprietorship by the surviving brother in the year following the death of his co-partner. Thus, the holding conflicts with the explicit recognition in *Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974), that such protection extends to "business records of the sole proprietor".

6. The holding below fails to apply the "small family" exception suggested by this Court in *Bellis* v. *United States*, 417 U.S. 85, 101 (1974), which should provide Fifth Amendment protection to the records of a two-brother partnership. The opinion also errs in failing to recognize that the former character of the records is not controlling where the partnership had been dissolved and fully terminated and the new owner was not holding the records in a representative capacity.

7. In *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court left open the possibility that the privilege against self-incrimination may protect records owned and possessed by the person to whom a subpoena is issued, even though such records were created and previously owned by another person or entity. Here, unlike *Fisher*, the existence and possession by the taxpayer of "third party" documents was not a foregone conclusion. On the contrary, the context of the present case makes it abundantly clear that the mere production of records of the former partnership, as well as workpapers prepared by an accountant, would involve incriminating testimonial admissions concerning existence, possession, and completeness. (425 U.S. at 410-411)

8. The issues raised in this case have wide importance in the administration of the revenue laws and the laws of other investigative agencies, and they are equally important in determining the rights and obligations of persons subpoenaed to produce records before congressional committees and grand juries.

ARGUMENT

The issues in the appeal from the order committing petitioner to jail for an indeterminate period are discussed at the outset because of their paramount importance. Argument pertaining to the underlying appeal from orders enforcing IRS summonses is set forth following discussion of the contempt issue.

I.

The Contempt Conviction

1. The holdings below violate the fundamental principles that the Government should be required to " 'shoulder the entire load' " in its contest with the individual and that the Fifth Amendment should protect one suspected of crime from being subjected "to the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964). Here, the District Court's order subjects petitioner to the dilemma denounced in *Murphy* and will oblige him to "choose his own brand of hemlock." *Traub* v. *United States*, 232 F. 2d 43, 48 (D.C. Cir. 1955). Unless clarification is forthcoming from this Court, there is grave danger that administrative and judicial subpoenas *duces tecum* will be used to coerce incriminating testimony, thereby seriously curtailing the protection afforded by the Fifth Amendment.

In *Curcio* v. *United States*, 354 U.S. 118, 128 (1957), this Court declared that forcing the custodian of non-privileged records "to testify orally as to the whereabouts of non-produced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth." Anticipating the holding in *Curcio*, the Court of Appeals for the Second Circuit proclaimed that a witness who fails to produce records can

not "legally be jailed for contempt for invoking his constitutionally protected privilege not to be a witness against himself." *United States* v. *Patterson*, 219 F. 2d 659, 662 (2d Cir. 1955).

Petitioner submits that the holding of the court below is in essential conflict with the holdings of the Courts of Appeals for the Second Circuit and District of Columbia Circuit in the previously cited *Patterson* and *Traub* cases, as well as violating the basic holdings of this Court in *Curcio* and *Murphy*.

The record shows that Hankins has been subjected to incarceration for refusing to waive his privilege against self-incrimination. He has been obliged to choose between imprisonment for remaining silent and waiving a sacred constitutional privilege. This surely necessitated a choice " 'between the rock and the whirlpool' ", which this Court refused to countenance under far less compelling circumstances in *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967). The compulsion proscribed by the Fifth Amendment is fashioned to thwart the "use of physical or moral compulsion to extort communications" from a person. *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910). See also *Couch* v. *United States*, 409 U.S. 322, 328 (1973), where the Court noted that it is the "extortion of information from the accused that offends our sense of justice."

Hankins was never called as a witness by the Government, in which case he could have denied that he was able to produce any of the "missing records" and then have asserted his Fifth Amendment privilege against self-incrimination upon further questioning. See *Curcio* v. *United States*, 354 U.S. 118 (1957). Instead, the District Court ruled that Hankins must take the stand voluntarily and completely waive his Fifth Amendment privilege.

If Hankins must testify to avoid incarceration, we submit that due process requires that he be given a non-incriminating opportunity to explain his inability to produce. Recently, the Court of Appeals for the Eighth Circuit utilized this approach in reversing a civil contempt order. *United States* v. *Anderson*, 567 F. 2d 839 (8th Cir. 1977). In *Anderson*, the taxpayer contended that he was indigent but refused, relying upon his privilege against self-incrimination, to submit an affidavit containing financial information. The Court of Appeals held that the taxpayer could not be forced to "choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination." (567 F. 2d at 840-841) The Court directed that the taxpayer be permitted to make an *in camera* disclosure which would then be sealed and not be used in criminal prosecution. A similar procedure should be utilized in this case if the Court should conclude, contrary to our basic contention, that Hankins did have an obligation to explain failure to produce in order to avoid a contempt commitment.

Stated simply, the District Court's order requires Hankins either to waive his privilege against self-incrimination or go to jail for an indefinite term. This cruel sentence has been imposed without the benefit of the due process safeguards inherent in a criminal trial. To protect the values encompassed by the Fifth Amendment, this Court must preclude the extortion of information from the target of a criminal investigation by use of the civil contempt power.

2. In a civil contempt proceeding, the complaining party must carry his burden of proof by "clear and convincing" evidence. *Cagle* v. *Scroggins*, 410 F. 2d 741, 742 (5th Cir. 1969); *United States* v. *Rizzo*, 539 F. 2d 458, 465 (5th Cir. 1976). Here, the Goverment made no attempt to

meet its burden of proof in the contempt proceeding, but was content to rest upon a sharply disputed finding of possession in the prior enforcement proceeding.

The statement of facts in this Petition amply discloses that the District Court's finding in the enforcement proceeding regarding a presumed admission by Hankins of possession was without foundation. It is abundantly clear that Hankins denied any ability to produce *all* of the summoned records. Moreover, without objection or comment, Hankins' counsel took the position at the outset that the issue of "ability to comply" should be reserved for a subsequent contempt proceeding in the event the constitutional and other defenses were overruled. (App. I, 58) See *Hagen* v. *Porter*, 156 F. 2d 362, 366 (9th Cir. 1946); *In re Reicher*, 159 F. Supp. 161 (S.D. N.Y. 1958); *United States* v. *Silvio*, 333 F. Supp. 264 (W.D. Mo. 1971).

Even if the disputed finding concerning possession had been warranted, and petitioner submits that there was no evidence to support the same, it would not have sufficed to meet the Government's burden of proof in the subsequent contempt proceeding. Although a preponderance of the evidence will suffice to support a finding of fact in an enforcement proceeding, "clear and convincing" evidence is required in a contempt proceeding. Thus, a finding regarding existence and possession in the enforcement proceeding cannot be given conclusive effect, or even shift the burden of proof, in the subsequent contempt proceeding. Cf. *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), and *Tomlinson* v. *Lefkowitz*, 334 F. 2d 262, 264-265 (5th Cir. 1964) (analogous difference between the burden of proof in civil and criminal proceedings).

The clarifying opinion discloses that the Court of Appeals erroneously assumed that a bare showing of failure to fully comply with an order enforcing an IRS summons

is sufficient to support a civil contempt sanction unless the alleged contemnor presents evidence providing a complete defense to the charge. In a civil contempt proceeding, the "show cause" order "merely is a method of serving notice on the party allegedly in noncompliance" and "does not shift the burden of proof from the petitioner to the respondent." *Louisiana Education Association* v. *Richland Parish School Board*, 421 F. Supp. 973, 976 (W.D. La. 1976).

The clarifying opinion also erroneously states that petitioner, in the contempt proceeding, attempted to relitigate the issue of possession. (App. B, pp. A34-35, n. 8) The simple truth is that the "ability to comply" issue was not litigated in the enforcement proceeding. No useful purpose would have been served by trying the issue inasmuch as Hankins never denied that he could produce *some* of the records. Thus, he *could not* have offered a "complete defense" to enforcement of the summonses, and requiring him to explain inability to produce specific documents was potentially incriminating. Clearly, such proof should not be required where the taxpayer is contesting production of any and all records on constitutional and other grounds.

Here, the Court of Appeals also mistakenly assumed that the holdings in the bankruptcy cases are analogous and that a summons enforcement order can not be challenged in a subsequent contempt proceeding for failure to comply. (App. B, pp. A34-35, n. 8) Unlike summons enforcement proceedings, the burden of proof necessary to obtain a turnover order in a bankruptcy case is precisely the same as that necessary for a finding of civil contempt, namely, clear and convincing evidence. See *Oriel* v. *Russell*, 278 U.S. 358, 363 (1929), and *Maggio* v. *Zeitz*, 333 U.S. 56, 64 (1948).

Moreover, the factual issue regarding possession had been *raised and tried* in the prior proceedings and no appeal had been taken from the turnover order in either *Oriel* or *Maggio*. Unlike the bankruptcy cases, the possession issue was not litigated in the summons enforcement proceedings involved herein, and the unsupported finding of possession was under attack in the appeal from the enforcement orders. (Opening Brief, pp. 5-6; Dkt. No. 76-3467) For these reasons, and because of the difference in the burden of proof, it was totally erroneous for the Court of Appeals to conclude that petitioner was attempting to relitigate an issue foreclosed by the enforcement proceeding. Moreover, the courts below erroneously held that petitioner had the burden of establishing why he could not comply with the orders.

3. Assuming *arguendo* that the District Court was justified in holding Hankins in contempt for failing to produce some or all of the "missing" records, the only appropriate relief would have been the imposition of the remedial, monetary sanction. The record simply does not support the required premise that coercive imprisonment is likely to result in the production of further records.

In response to petitioner's Motion to Dismiss the contempt petition on the ground that he was unable to produce any of the "missing" records, the Government conceded that it could "offer no proof that Hankins [was] still in possession" of any "missing" records. (Memorandum in Opposition, p. 7; R. 55) On appeal, the Government merely argued that incarceration would enable the District Court to ascertain whether Hankins was responsible for the destruction of records. (Brief for the Appellees, p. 47)

In *McNeil* v. *Patuxent Institution Director*, 407 U.S. 245, 251 (1972), this Court appropriately noted that:

> "Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt theory a person who lacks the present ability to comply."

As the basis for this pronouncement, *McNeil* cited *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). In *Maggio*, this Court ruled that issuance of a civil contempt order, not supported by proof of present ability to perform, was a "flagrant abuse of process." (333 U.S. at 64)

The holding in *Maggio* forbids the use of coercive civil contempt orders not founded on proof of present ability to perform. Such orders are nothing more than disguised findings of criminal contempt, without the due process safeguards required in a criminal proceeding. (333 U.S. at 67-68) Most significantly, incarceration for civil contempt does not provide the limited and definite term of confinement obligatory in a criminal contempt proceeding.

In *McNeil* v. *Patuxent Institution Director*, 407 U.S. 245, 251 (1972), the Court was not obliged to consider "what limitations the Due Process Clause places on the contempt power" or the "precise contours of that power". Perhaps indeterminate confinement is appropriate where, as in *Uphaus* v. *Wyman*, 360 U.S. 72, 81 (1959), the contemnor admits that he has the documents but refuses to produce them. In the absence of such an admission, or at the very least "clear and convincing" proof of ability to comply, incarceration for civil contempt constitutes a violation of the Due Process Clause.

II.

The Underlying Appeal

1. Petitioner's rights under the Fifth Amendment will be violated if he is compelled to produce records of a business concededly operated by him during 1972 as a sole proprietor. This Court should reaffirm its firm declaration in *Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974), that the privilege extends to the "business records of the sole proprietor." Two appellate courts, in post-*Fisher* decisions, have explicitly stated that Fifth Amendment protection continues to exist with respect to such records. *United States* v. *Plesons*, 560 F. 2d 890, 893 (8th Cir. 1977); *United States* v. *Helina*, 549 F. 2d 713, 716-717 (9th Cir. 1977).

The Court of Appeals should have accepted the Government's concession in the trial court that the 1972 records were those of a sole proprietor and rejected the conflicting argument belatedly raised on appeal. During his opening statement, trial counsel for the Government asked only for the production of the former partnership records, stating that this involved a "close question". (App. I, 70) He conceded in open court that the partnership became a "sole proprietorship" by the "operation of law" upon the death of Bewel Hankins. (App. I, 68) At both the enforcement and contempt hearings, the revenue agent testified that the business was operated as a "sole proprietorship" during 1972. (App. I, 167; App. II, 122)

The Government did not request the District Court to make any finding with respect to the 1972 records. Accordingly, the District Court held that the Fifth Amendment was "not available to bar production of the partnership records" and *merely ruled* that Hankins would be directed "to produce the books and records of the Hankins Lumber Company partnership." (App. C, p. A62)

Confirming the concession made at the hearing, no demand was made for production of the 1972 records following Hankins' appearance in response to the Court's order and Hankins was not charged in the contempt proceeding with failure to produce the 1972 records. Moreover, the Government determined that Hankins was the sole owner of the lumber business in 1972 by using the beginning and ending assets and liabilities of the lumber business in determining a deficiency in Hankins' income tax liability for 1972. (App. II, 118, 123, 162)

On appeal, the Government conceded that the partnership terminated at date of death and that the business was not "being operated as a 'partnership' in 1972". (Appellee's Brief, pp. 49, 51) Nevertheless, the Court of Appeals refused to recognize the existence of the sole proprietorship and held that the business was being operated as "a partnership between Burton Hankins and the estate of his deceased brother." (App. A, pp. A7, 12-13; App. B, pp. A32-33)

The record clearly shows that Hankins continued the operation, not in partnership with the estate, but as a sole proprietor concerned with protecting and conserving the value at death of the estate's equity in the assets of the former partnership. As surviving partner, Hankins was "entitled to the exclusive possession and control" of the former partnership assets, subject only to the estate's equitable interest in the partnership surplus at the time of Bewel's death. 68 C.J.S. *Partnership* §275 (1950); 33 C.J.S. *Executors and Administrators* §113 (1942); *Robertshaw* v. *Hanway*, 52 Miss. 713, 717 (Miss. 1876). Accordingly, petitioner should be accorded the constitutional protection applicable to a sole proprietorship with respect to the 1972 records.

2. Petitioner has been unlawfully denied the right to assert his privilege against self-incrimination to bar the production of records of a partnership that formerly existed between himself and his deceased brother. Petitioner submits that this Court should give substance to the suggestion in *Bellis* v. *United States*, 417 U.S. 85, 101 (1974) that the records of a "small family partnership" should be given protection under the Fifth Amendment.

The Court of Appeals for the Fifth Circuit did not address itself to this issue despite its recent acknowledgement that the *Bellis* exception would apply under appropriate circumstances. *United States* v. *Greenleaf*, 546 F. 2d 123, 128 (5th Cir. 1977). The incongruity apparent from the recent opinions in the Fifth Circuit merely adds to the present uncertainty regarding the privileged status of the records of small family partnerships. Until this question is resolved, litigation of the issue will continue to burden the courts.

The two-brother partnership in the pending case was precisely the same as the partnership entity in *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D. N.Y. 1972). In *Bellis*, the Court cited *Slutsky*, which involved a very substantial business operation, as an example of a protected "small family partnership". (417 U.S. at 101).

Even if the records in question would not have been privileged during the existence of the partnership, Fifth Amendment protection attached when Hankins acquired sole and unqualified ownership and possession thereof following the death of his brother and prior to the commencement of the income tax investigation. This is implicit from the indisputable consequence that the estate and Bewel's heirs gave up all right to inspect the records, or to have a formal accounting, when they sold their interests to petitioner during 1972. *Sanderson* v. *Cooke*,

175 N.E. 518, 521 (N.Y. Ct. App. 1931); *Gass* v. *Robie*, 25 A. 2d 487, 488 (Me. Sup. Jud. Ct. 1942); *Kelly* v. *Kelly*, 411 S.W. 2d 953, 955 (Tex. Civ. App. 1967); 60 Am. Jur. 2d *Partnership* §§265, 267, 296 (1972).

In *Bellis*, the partnership was still in the process of winding up its affairs when the subpoena was issued. Unlike *Bellis*, Hankins did have a "direct ownership interest" in the records, not merely a "derivative interest" subject to rights of access and inspection by other partners. (417 U.S. at 97-98) Thus, Fifth Amendment protection is not foreclosed by the holding in *Bellis*.

The decisions denying privilege to the records of a dissolved corporation are not controlling. Unlike a corporation, which is a creature of the State, a partnership is a mere contract, or the relationship arising out of a contract, between two or more persons. 68 C.J.S. *Partnership* §1 (1950). Although the State's visitorial powers of inspection are not affected by a dissolution of a corporation, the right of access to, and inspection of, partnership records is conferred only upon the partners. Such rights are terminated upon the unrestricted sale of their interests in the partnership. Inasmuch as there was no basis for a finding, as *Bellis* requires, that Hankins was holding the records in a "representative capacity" when the summons was served, his claim of privilege should have been upheld. (417 U.S. at 97-98)

Because Hankins was not holding the records in a representative, custodial capacity or as a mere possessor, nothing said in *Fisher* v. *United States*, 425 U.S. 391 (1976), regarding the unavailability of the privilege to such individuals, is applicable to this case. *Fisher* teaches that the compelled act of producing personally owned records would constitute a testimonial, incriminating admission of their existence and possession, as well as an implicit au-

thentication or attestation of their genuineness. (425 U.S. at 411-412)

Unlike *Fisher*, the existence and possession of the records demanded from Hankins was not a tacit assumption or "foregone conclusion". As owner of the records, Hankins did not have a custodian's obligation to retain or preserve them for access by others. The incarceration order for failure to produce certain "missing" records of the former partnership clearly establishes the incriminating nature of the act of production in response to a subpoena *duces tecum*.

3. A further violation of petitioner's Fifth Amendment privilege resulted from the order compelling him to produce the Boswell workpapers. Hankins had acquired "personally all right, title, interest and ownership" therein prior to any demand for the papers by the Government. (App. I, 420-421) For the reasons set forth above, recognition of the Fifth Amendment privilege would not conflict with this Court's holding in *Fisher* v. *United States*, 425 U.S. 391 (1976).

The entire thrust of the *Fisher* opinion is directed at the compulsory production of an accountant's workpapers in the *mere possession* of a taxpayer or his attorney. The Court did not decide that the privilege is inapplicable where the taxpayer had personally obtained exclusive ownership and control of such papers. Although the newly enunciated rationale of *Fisher* indicates that the content of voluntarily prepared papers is not controlling, the Court recognizes that "the act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own." (425 U.S. at 410) In addition to the implicit authentication of the records, the Court declared that compliance with the subpoena "tacitly concedes the existence of the papers demanded and their possession or control

by the taxpayer." (425 U.S. at 410) It is this latter incriminating, testimonial aspect that precludes compulsory production of Hankins' personally owned papers.

In *Fisher*, the implicit admission of existence and possession did not rise to the level of incriminating testimony. Unlike the instant case, the papers in *Fisher* belonged to the accountant and the Government was not "relying on the 'truthtelling' of the taxpayer to prove the existence of or his access to the documents." (425 U.S. at 411) The rejection of the privilege was premised on the fact that Fisher was a mere "possessor" or custodian of the workpapers and the circumstance that the "existence and possession or control of the subpoenaed documents" was not genuinely in issue. (425 U.S. at 412) See *Curcio* v. *United States*, 354 U.S. 118, 128 (1957), which denied Fifth Amendment protection to the custodian of records "because he does not own the records and has no legally cognizable interest in them."

Unlike *Fisher*, Hankins was not a custodian or mere possessor of the accountant's workpapers. As the sole owner of the papers, Hankins had a right to do with them whatever suited his convenience. Hence, there could be no "foregone conclusion" with respect to the existence and the possession of Hankins' personally owned "Boswell" papers.

The testimonial communication is particularly incriminating where, as in the instant case, the existence and possession of the records is disputed and partial compliance results in a contempt proceeding wherein the summoned party can extricate himself only by oral testimony. Petitioner's pending incarceration for contempt presents a classic illustration of the danger perceived by this Court, in both *Fisher* and *Andresen* v. *Maryland*, 427 U.S. 463, 473-

474 (1976), that enforcement of a summons for the production of documents may have incriminating, testimonial implications.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

PAUL P. LIPTON
LIPTON & PETRIE, LTD.
625 North Milwaukee Street
Milwaukee, Wisconsin 53202

L. ARNOLD PYLE
WATKINS, PYLE, LUDLAM, WINTER & STENNIS
Post Office Box 427
Jackson, Mississippi 39201

JAMES S. NIPPES
DOSSETT, MAGRUDER AND MONTGOMERY
1800 Deposit Guaranty Plaza
Jackson, Mississippi 39201

Counsel for the Petitioner

APPENDIX

APPENDIX A

UNITED STATES of America and Robert E. Grant, Special Agent, Internal Revenue Service, Plaintiffs-Appellees,

v.

A. Burton HANKINS, Individually and as Executor of the Estate of Bewel A. Hankins, et al., Defendants-Appellants,

Robert Lewis Smith,
Intervenor-Appellant.

UNITED STATES of America and Robert E. Grant, Special Agent, Internal Revenue Service, Petitioners-Appellees,

v.

A. Burton HANKINS and Hugh C. Montgomery, Jr., Respondents-Appellants.

Nos. 76-3467 and 77-1967.

United States Court of Appeals,
Fifth Circuit.

Jan. 12, 1978.

United States sought enforcement of Internal Revenue Service summons. The United States District Court for the Northern District of Mississippi, Orma R. Smith, J., granted enforcement, 424 F.Supp. 606, and also granted enforcement of other summonses and held certain parties in contempt. The Court of Appeals, Coleman, Circuit Judge, held that: (1) surviving partner could not assert

Fifth Amendment privilege to IRS summons directed at partnership tax records; (2) executor of deceased partner's estate could not assert Fifth Amendment privilege with respect to estate papers; (3) business had not been operated as a sole proprietorship in the year following partner's death so that the surviving partner could not assert Fifth Amendment privilege to the IRS summons for records for those years; (4) accountant was required to provide subpoenaed records; (5) investigation of accountant was so surrounded by a criminal aura as to preclude use of administrative summons to obtain his testimony, and (6) order which held one person in contempt but deferred sentencing pending outcome of other appeals was not a final appealable decision.

Affirmed in part, reversed in part, and dismissed in part.

1. Witnesses (Key) 298

Since internal revenue subpoenas for partnership records prior to the date of death of one of two partners would not have infringed any Fifth Amendment privilege of either partner had they been served during the lifetime of both partners, subsequent acquisition of those papers by the sole surviving partner did not change either the identity or character of the records from what they were at the time that they were made so that they were not personal records as to which Fifth Amendment privilege could be asserted by the surviving partner. U.S.C.A.Const. Amend. 5; 26 U.S.C.A. (I.R.C.1954) § 7602.

2. Witnesses (Key) 298

Since, after death of one of two partners, surviving partner continued to operate the business by virtue of court order in probate proceedings, and since purchase of

interest of three of the heirs was allowed in trust for delivery of stock in successor corporation, the books, records, and papers for the operation during the year following the death of one partner were not the private personal papers of the surviving partner and were not the property of a sole practitioner or sole proprietor so that the surviving partner could not assert Fifth Amendment privilege in response to IRS summons. 26 U.S.C.A. (I.R.C.1954) § 7602; U.S.C.A.Const. Amend. 5.

3. Witnesses (Key) 298

Since audit was not made at the behest of surviving partner but rather was made in opposition to his interest at the behest of widow of deceased partner, partner could not assert Fifth Amendment privilege in response to IRS summons directed at the papers connected with the audit. 26 U.S.C.A. (I.R.C.1954) § 7602; U.S.C.A.Const. Amend. 5.

4. Witnesses (Key) 298

Papers incident to estate of deceased partner were not personal and private papers of the executor of that estate, who was also the surviving partner in the operation, so that he could not assert Fifth Amendment privilege, either as executor or as surviving partner, in response to Internal Revenue Service subpoenas directed to the papers. 26 U.S.C.A. (I.R.C.1954) § 7602; U.S.C.A.Const. Amend. 5.

5. Witnesses (Key) 307

Person who is called to testify before internal revenue agent must appear in response to the summons and may claim Fifth Amendment privilege only as to specific questions propounded to him by the IRS. U.S.C.A.Const. Amend. 5.

6. Internal Revenue (Key) 1458

If Internal Revenue Service wished testimony from any person who was associated with the business and who would not assert Fifth Amendment privilege, it should use its own resources to subpoena such a person and it was improper for court to direct president of the corporation to produce a witness who would be familiar with the records, books, and papers of the corporation and who would not claim the Fifth Amendment privilege against self-incrimination. U.S.C.A.Const. Amend. 5.

7. Internal Revenue (Key) 1459

Since no recommendation for prosecution of accountant had been made by the Internal Revenue Service and since there was no evidence of bad faith on the part of the IRS in the issuance of the summons, the summons was proper and enforceable insofar as it sought records and work papers relative to tax returns prepared for others. 26 U.S.C.A. (I.R.C.1954) § 7602.

8. Internal Revenue (Key) 1458

Since accountant could have no civil liability as a consequence of investigation into corporate and estate tax returns but could only have criminal liability, and since *Miranda* warnings had been given to the accountant by internal revenue agent prior to any questioning, accountant could not be required to answer subpoena ad testificundum from the Internal Revenue Service since the investigation as to the accountant had such a dominant criminal aura as to preclude use of an administrative summons, even though the Internal Revenue Service had made no recommendation for criminal prosecution of the accountant. U.S.C.A.Const. Amend. 5.

9. Internal Revenue (Key) 1460

In the absence of any evidence presented by witness concerning his lack of possession of records which had been summoned by the Internal Revenue Service, witness was properly held in contempt for failing to respond to IRS subpoena which had been enforced by the district court. 26 U.S.C.A. (I.R.C.1954) § 7602.

10. Witnesses (Key) 21

Where witness had been held in contempt for failing to testify but where sentence had been deferred pending outcome of appeal in related matter, there was no final decision of the district court from which appeal could be taken. 28 U.S.C.A. § 1291.

Paul P. Lipton, Milwaukee, Wis., James S. Nippes, Jackson, Miss., for A. Burton Hankins.

Charles L. Brocato, Jackson, Miss., for Hugh C. Montgomery, Jr.

J. N. Raines, Michael A. Robinson, Memphis, Tenn., for Robert L. Smith.

H. M. Ray, U. S. Atty., William M. Dye, Jr., Thomas W. Dawson, Asst. U. S. Attys., Alfred E. Moreton, III, Oxford, Miss., Gilbert E. Andrews, Chief, App. Section, Myron C. Baum, Acting Asst. Atty. Gen., Robert E. Lindsay, M. Carr Ferguson, Asst. Attys. Gen., Charles E. Brookhart, William A. Whitledge, Attys., Tax Div., Dept. of Justice, Washington, D. C., for United States.

Appeals from the United States District Court for the Northern District of Mississippi.

Before COLEMAN, SIMPSON, and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge.

This is a consolidated appeal. No. 76-3467 is taken from orders of the District Court for the Northern District of Mississippi enforcing several summonses directed by the Internal Revenue Service to A. Burton Hankins, Hugh Montgomery and Robert Lewis Smith, 26 U.S.C., § 7602.

No. 77-1967 is from a subsequent order of the Court finding Hankins in contempt of its earlier enforcement order and Montgomery in contempt for refusing to answer questions in open court.

We affirm in part, reverse in part, and dismiss Montgomery's appeal in No. 77-1967 for lack of appellate jurisdiction.

In 1957, A. Burton Hankins and Bewel Hankins, *brothers*, formed a partnership for the operation of a planing mill and lumber business at Elliott, Grenada County, Mississippi.[1] The partnership continued until the death of Bewel on November 19, 1971.

Bewel was survived by the wife of his second marriage and by three sons of a former marriage, none of the three having attained the age of majority. The surviving widow, Mrs. Frances Hankins, initially contested Bewel's last will and testament. A certified public accountant, William Boswell, was retained to perform audits of the late husband's financial status, which included the Hankins Lumber Company. Thereafter, as authorized by state law, Mrs. Hankins renounced the will and elected to take as if by intestacy. Consequently, in January, 1972, Bewel Hankins' last will and testament was admitted to probate in solemn form by the Chancery Court of Grenada County. That Court,

1. The record does not reveal whether the partnership agreement was oral or written. It is undisputed that each brother owned a 50% interest in the partnership.

in compliance with state statutes, authorized Burton Hankins to continue the operations of the partnership.

In August, 1972, by appropriate instruments of conveyance, Mrs. Frances Hankins sold her interest in the lumber company to the surviving partner, Burton Hankins.

In October, 1972, the Chancery Court allowed Burton to purchase the interests of the sons, nevertheless requiring, as Bewel's will had requested, that upon the conversion of the partnership into a corporation, to be known as Hankins Lumber Company, Inc., the children would be sold stock equal to the value of their previously existing interest in the partnership. Burton thus became the majority stockholder in the new corporation, which was not activated until January 2, 1973. Having purchased from the widow and sons the entire interest of the deceased Bewel Hankins in 1972, with the corporation taking effect in 1973, Burton filed his 1972 income tax return as sole proprietor of the business for that year. In the hearings before the District Court the attorney for the Department of Justice and the Internal Revenue Agent referred to the 1972 operations as that of a sole proprietorship, but the Court made no findings as to whether the operations from November 19, 1971 to January 2, 1973, were that of a sole proprietorship or a partnership between Burton Hankins and the estate of his deceased brother.

On May 8, 1974, the Chancery administration of the Estate of Bewel Hankins was concluded and Burton, as Executor, was given his final discharge.

In January, 1973, an informant, Leonard E. Parnell, an employee of Hankins' certified public accountant, wrote the Internal Revenue Service, alleging that he had seen alterations to the 1971 Hankins records raising a potential for tax fraud. The matter was referred for investigation

to the Audit Division. A revenue agent contacted Burton Hankins, who referred him to his accountant, Lewis Smith, for the audit of the 1971 books. During that examination the agent uncovered apparent discrepancies, so he then requested the records for 1972. Smith informed the agent that the 1972 records were held by Mr. Hankins' attorney, Hugh Montgomery. In June, 1974, the revenue agent met with Attorney Montgomery and discussed the 1971 adjustments. Mr. Montgomery, on behalf of Hankins, offered to make good the 1971 discrepancies but the agent refused to close out 1971 before seeing the 1972 books. This brought on an impasse and the interview was terminated. The case was then turned over to the Intelligence Division and assigned to a special agent, with Montgomery informing the Internal Revenue Service that Burton Hankins, relying on his Fifth Amendment rights, declined to produce the 1972 records.

A heavy downpour of Internal Revenue summonses soon ensued.

One summons, dated March 10, 1975 to A. Burton Hankins, Hankins Lumber Company, Grenada, Mississippi 38926, required him to appear and produce the following:

> "All records in your possession pertaining to the Hankins Lumber Company partnership for the years 1968, 1969, 1970, 1971, and 1972, and other records including, but not limited to the following:
>
> "1. General Journal and General Ledger.
>
> "2. Accounts Receivable Subsidiary Ledger.
>
> "3. Accounts Payable and Accounts Receivable Ledger Sheets.
>
> "4. Bank statements, canceled checks, check stubs, and original deposit tickets, if available, or duplicate deposit tickets for all bank accounts open during 1968 through 1972.
>
> "5. All accountant's work papers pertaining to the preparation of the U. S. Partnership Return of Income (Form 1065) for the Hankins Lumber Company for the period beginning January 1, 1968, and ending November 20, 1971.
>
> "6. Copy of formal partnership agreement."

Another summons of the same date required Hankins to appear and produce

> "All records pertaining to the preparation of the estate tax return and the settlement of the estate of Bewel A. Hankins, a former partner in the Hankins Lumber Company, including, but not limited to, a list of the partnership trade accounts receivable and accounts payable, as well as inter-company accounts receivable and payable."

Additionally, a summons directed Hankins to produce the books, records, and working papers of the corporation for 1973 and to testify thereasto. The *duces tecum* portion of this summons has been satisfied and is no longer an issue. The testimonial aspect of the summons will be treated *infra*.

In response to the summonses, Hankins appeared, with counsel, and would state only that he had not produced and would not produce the records.

As no doubt expected, petitions were filed to enforce the summonses. At the hearing, the trial judge found that the government had made the requisite showings of relevancy, materiality and proper purpose. The record supports these findings. The Court ordered Mr. Hankins

to produce the desired documents and to testify after the government had an opportunity to examine them. Hankins Lumber Company, Inc., was directed to appoint an individual who was conversant with the books and records, who would not claim the Fifth Amendment privilege, to appear and testify as to those books and records.

Hankins claims on appeal that by virtue of his status as a partner and later purchaser of the entire interest of the deceased partner he owns all the partnership papers in his personal capacity and not in a representative capacity, that because the Bewel Hankins estate is closed he likewise owns such of those papers as are now in his possession, and that by transfers appearing of record he also owns the papers produced by the Boswell audit; therefore, the Fifth Amendment privilege protects the papers from involuntary disclosure:

> "[No person] shall be compelled in any criminal case to be a witness against himself", Amendment V.[2]

We address ourselves first to the matter of the partnership papers.

In *Boyd* v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the Supreme Court held that any forcible and compulsory extortion of a man's private papers to be used as evidence to convict him of crime violates the Fifth Amendment privilege.

More recently, however, the Supreme Court has adopted the view that the compulsion must be exerted upon the person claiming the privilege, not someone else, and that the compulsion must result in that person being

2. The right of people to be secure in their papers and effects against unreasonable searches and seizures is a guarantee of the Fourth Amendment.

made a *witness* against himself, *Fisher* v. *United States*, 425 U.S. 391, 397, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) and cases cited. Compulsion for production against the individual's accountant or his attorney in the absence of the attorney-client relationship falls without the protection, *Couch* v. *United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973); *Fisher* v. *United States*, *supra*.

Even more specifically, the Court held that "the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information'" (citations omitted). *Id.*, 425 U.S. at 401, 96 S.Ct. at 1576.

The Court went on to hold, 425 U.S. at 409, 96 S.Ct. at 1580:

> "A subpoena served on a taxpayer requiring him to produce an accountant's work papers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own testimonial communications (citations omitted). The accountant's work papers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him."

The Court concluded that "however incriminating the contents of the accountant's workpapers might be, the act of producing them . . . would not itself involve testimonial self-incrimination". *Id.*, at 411, 96 S.Ct. at 1580.

At the end of all this, however, the Court said, 425 U.S. at 414, 96 S.Ct. at 1582:

"Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers', see *Boyd* v. *United States*, 116 U.S., at 634-635, 6 S.Ct. 524."

During the course of the *Fisher* opinion, 425 U.S. at 408, 96 S.Ct. at 1579, the Court took occasion to say:

"Furthermore, despite *Boyd*, neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds, *Bellis* v. *United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974)."

[1] From this most recent decision of the Supreme Court we are convinced that subpoenas for the Hankins Lumber Company partnership records from January 1, 1968 to November 19, 1971, the date of Bewel Hankins' death, would not have infringed any Fifth Amendment privileges of either partner had the subpoenas been served during the lifetime of the partners. Neither do we believe that the subsequent acquisition of those papers by Burton Hankins, as his own, changes either the identity or character of the books, papers, and records from what they undoubtedly were at the time they were made, *United States* v. *Bellis*, *supra*, 417 U.S. at 96, 94 S.Ct. 2179, Footnote 3.

[2] Some doubt is cast upon the status of the 1972 papers because the Revenue Agent and the Attorney for the Department of Justice uniformly referred to the 1972 operations as a sole proprietorship. The District Court made no specific finding on this point, but the trial record shows that in 1972 Burton Hankins continued to operate the business by virtue of a court order, which necessarily

included the interests of the heirs, devisees, and legatees of the deceased partner. Moreover, when Burton Hankins bought the interests of the three sons, with court approval, in October, 1972, the purchase was allowed *in trust* for the delivery of the prescribed amount of stock in the successor corporation. We must accordingly hold that the 1972 books, records, and papers for the operation were not the private personal papers of Burton Hankins, *Fisher* v. *United States*, *supra*, nor were they the property of a sole practitioner or sole proprietor, *Bellis* v. *United States*, *supra*, 417 U.S. at 87, 88, 94 S.Ct. 2179.

[3] Certainly there can be no doubt that Mr. Hankins may be required to produce the papers connected with the Boswell audit. The audit was not made at his behest; indeed it was made in opposition to his interests. While Hankins may be the "owner" and now in possession it contains nothing that could be charged to him as his own testimony.

[4] We are equally unable to see how any of the papers incident to the estate of Bewel Hankins may be denominated as "personal and private". Even though the estate is now closed, the Executor was never acting in either a personal or a private capacity. He was an officer of the Court which appointed him, under whose direction and control he served. He was answerable as a fiduciary, charged with duties which transcended his personal wishes or personal views. Again, the books, papers, and records did not lose either their nature or their identity when the estate was closed. Additionally, as to the estate, Hankins was acting in a representative capacity, *Bellis*, *supra*.

The judgment of the District Court enforcing the summonses directed to Burton Hankins for the production of books, papers, and records must, in all respects, be affirmed.

[5] The requirement that Mr. Hankins testify before the Internal Revenue Agent is, of course, subject to the rule prevailing in this Circuit that he must appear in response to the summons, thereafter the Internal Revenue Service must propound specific questions, and the witness may then claim the privilege as to each question, *United States* v. *Malnik*, 5 Cir., 1974, 489 F.2d 682; *United States* v. *Roundtree*, 5 Cir., 1970, 420 F.2d 845.

[6] This brings us to the final issue, involving the order of the trial court that Mr. Hankins, as President of the corporation, produce as a witness before the special agent some employee of the firm who is familiar with the books, records, and papers of the corporation for 1973, and who will not claim the Fifth Amendment privilege against self-incrimination. At first blush this struck us as a most unusual order. The government in its brief cites no tax case in which such an order has been entered. It relies on *United States* v. *Kordel*, 397 U.S. 1, 7, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970), a Food and Drug case in which no officer of the corporation claimed the privilege, no showing was made that no officer of the corporation could have answered the questions without incriminating himself personally, and, more to the point, no court had entered such an order as we have here. The government has made no showing of its inability to ascertain who kept the books, records, and papers for the corporation in this comparatively small operation in a small city in the year 1973. If the Internal Revenue Service wishes such testimony it should use its own resources to subpoena any person likely to have the requisite information and let them claim the privilege if they so desire. Moreover, we do not know how Hankins could compel the attendance of a witness, nor do we see how the Constitution would allow him to speak for the strictly personal right of any

individual to claim the privileges of the Fifth Amendment. We accordingly reverse this portion of the District Court order, especially since the record shows that Accountant Smith was employed by Hankins in 1973, apparently was in charge of its accounting facilities for that year, and the government frankly conceded on oral argument that Mr. Smith is a prime target for criminal prosecution in connection with this very case.

The Summons for Robert Smith, C.P.A.

The summons issued to Robert Smith called for testimony and all records and workpapers relative to the estate tax return and 1973 corporate tax return. Smith contends that the tax investigation assumed a predominantly criminal aspect, and that enforcement of the summons was therefore an abuse of the Court's process.

Smith has complied with the Court's order to produce the 1973 corporate records. That portion of the case is therefore moot, *United States* v. *Carpenter*, 5 Cir., 1970, 425 F.2d 264; *Baldridge* v. *United States*, 5 Cir., 1969, 406 F.2d 526.

The government did not pursue the estate papers at the enforcement hearing, and the District Court's order made no mention of the estate papers. That omission was not cross appealed by the government. Consequently, the only issue remaining for our consideration is the claim that the investigation, as to Robert Smith, acquired such a dominant criminal aura as to preclude the use of an administrative summons.

The Internal Revenue Service has made no recommendation for criminal prosecution of appellant Smith. However, the government counsel unequivocally informed the

Court during oral argument that Smith probably would be prosecuted should evidence of criminal conduct on his part be uncovered.

[7] Since no recommendation for prosecution had been made, and there is in the record no evidence of bad faith on the part of the Internal Revenue Service in the issuance of the summons, we hold that the use of the summons was proper and enforceable as to the records, *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971).

[8] Our inquiry does not end here, however, for we must still consider the *ad testificundum* portion of the summons.

Of key significance to this issue is the fact that Smith could have no civil liability as a consequence of this investigation, only criminal liability. The *Miranda* warnings given to Smith by the agent prior to any questioning was a clear signal of his potential criminal liability.

Nevertheless, the government argues that Smith can be compelled to appear, take the witness stand, and either answer the questions the government asks, or plead his Fifth Amendment protection on a question-by-question basis. In the particular circumstances of Smith's situation, we disagree. Were Smith the target of an investigation for robbing a bank, he would unquestionably have the right to stand on his silence. There is no significant difference between Smith as a suspected participant in a tax fraud and Smith as a suspected bank robber.

We hold that Smith cannot be compelled to take the stand by a § 7602 Internal Revenue Service summons. The order that he must do so is reversed.

No. 77-1967

Hankins' Appeal from Contempt

On the date ordered by the Court after the enforcement hearing, Hankins produced various books and records. The government discovered that the Boswell audit report itself was not produced and that numerous pages were missing from the company books. Upon petition by the government, the Court issued an order to show cause why Hankins should not be held in contempt of the Court's enforcement order. The ensuing hearing resulted in a conviction for contempt. Hankins was ordered into the custody of the Attorney General until such time as he produced the missing papers. Confinement has been stayed pending our determination of this appeal.

[9] Hankins argues that the District Court erred in holding him in contempt because he had informed the Court at the enforcement hearing, through his attorney, that he did not have all the records summoned by the government. Our inspection of the record reveals this contention to be totally devoid of merit.[3] No evidence on inability to produce was presented by Hankins during the enforcement hearing in response to the government's evidence that the books and records were in his hands. At the contempt hearing the government relied on the finding of fact, of which the Court took judicial notice,

---

3. Finding of Fact by the District Court:

Each of the respondents in these four cases, with the exceptions of Attorneys Hugh C. Montgomery and Tommy M. McWilliams, acknowledged to the Court that he had in his possession, in whatever capacity, the summoned records. Respondent Montgomery denied that he had in his possession at the time of the issuance of the summons to him the records demanded by that summons (the Boswell audit papers). The government accepted that representation and deemed the *duces tecum* provision of the summons to Montgomery complied with.

and the testimony of Special Agent Grant that apparently various pages of the produced records had been systematically removed. In an effort to rebut this evidence, Hankins attempted to testify under the condition that he not be exposed to cross-examination. When the Court properly refused to agree to this condition, Hankins rested without offering evidence.

The government has carried its burden to obtain enforcement of its summonses by showing that they were administratively regular and that the information sought was relevant, material, and not in the hands of the Commissioner, *United States* v. *Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). No evidence has been presented by Hankins, at either the enforcement hearing or the contempt hearing that he was unable to produce the records. He relies on *United States* v. *Silvio,* 333 F.Supp. 264 (W.D.Mo., 1971) for the proposition that the government must prove that the records are in existence and in the possession of the respondent before any defense of non-possession need be raised. What appellant overlooks is that the respondents in *Silvio* appeared before the Internal Revenue Agent as ordered by the District Court and testified under oath that they had no further documents. In response to a subsequent show cause order respondents submitted an affidavit stating again that all the records in their possession had been produced. In the face of these representations, the Court required the government to show existence and possession of the papers sought. Here, however, Hankins has made no showing whatsoever that he does not possess the records named in the summonses.

We have no alternative but to affirm the order of contempt as to Hankins.

No. 77-1967

The Summons to Attorney Montgomery and His Subsequent Conviction of Contempt

On March 14, 1975, Hugh C. Montgomery, Jr., a tax attorney, formerly for seventeen years an employee of the Internal Revenue Service, was served with a subpoena to appear and produce the Boswell audit papers. Montgomery appeared and stated that he did not have them. The government accepts this response. He declined to answer as to whether he had ever had the papers, claiming both the attorney-client privilege and Hankins' Fifth Amendment privilege.

At the enforcement hearing, the District Court, in part, ordered as follows:

> "ORDERED, ADJUDGED and DECREED that Hugh C. Montgomery, Jr. comply with the summons issued to him on March 14, 1975, by appearing before Special Agent Robert E. Grant, or any other proper officer of the Internal Revenue Service, at a time and place to be agreed upon mutually by Hugh C. Montgomery, Jr., and Special Agent Grant, for the purpose of giving testimony relating to the federal tax liabilities of A. Burton Hankins for the years 1969 through and including 1973 . . . ."

[10] On December 9, 1976, Montgomery appeared and declined to answer questions, again claiming the attorney-client relationship and other grounds. He was cited for contempt of the enforcement order. At the hearing he testified that Mr. Hankins had employed him "to advise and consult with him about an examination of certain income tax returns of his that were under examination

at the time". Upon advice of counsel, he refused to answer as to what books and records he had examined. For failure to answer after being directed to do so by the Court he was held in contempt but sentence was deferred pending the outcome of the appeal in No. 76-3467.

Mr. Montgomery's appeal from the contempt finding must be dismissed for lack of a final decision of the District Court, 28 U.S.C., § 1291; *S. E. C.* v. *Naftalin*, 8 Cir., 1972, 460 F.2d 471, 475.

The other errors assigned by the respective appellants have been duly considered and found to be without merit.

The results in both appeals are:

The enforcement of the summonses directed to Burton Hankins and his subsequent conviction of contempt for failure to obey the enforcement order are affirmed.

The direction that Smith shall give testimony before the Internal Revenue Service is reversed.

Montgomery's appeal from the finding of contempt in the presence of the Court is dismissed.

APPENDIX B

UNITED STATES of America and Robert E. Grant, Special Agent, Internal Revenue Service, Plaintiffs-Appellees,

v.

A. BURTON HANKINS, Individually and as Executor of the Estate of Bewel A. Hankins, et al., Defendants-Appellants,

Robert Lewis Smith,
Intervenor-Appellant.

UNITED STATES of America and Robert E. Grant, Special Agent, Internal Revenue Service, Petitioners-Appellees,

v.

A. Burton HANKINS and Hugh C. Montgomery, Jr.,
Respondents-Appellants.

Nos. 76-3467, 77-1967.

United States Court of Appeals,
Fifth Circuit.

Oct. 3, 1978.

The United States sought enforcement of Internal Revenue Service summons. The United States District Court for the Northern District of Mississippi, Orma R. Smith, J., granted enforcement, 424 F.Supp. 606, and subsequently held certain parties in contempt, and appeals were taken. The Court of Appeals, 565 F.2d 1344, affirmed in part, reversed in part, and dismissed in part, and thereafter certain parties petitioned for rehearing. The Court of Appeals, Coleman, Circuit Judge, held that: (1) under Mississippi law, surviving partner, vis-a-vis heirs and legatees of de-

ceased partner, stood in the same shoes as an administrator, with status of trustee, and could not thereafter legally proceed in the operation of the business as a sole proprietor; (2) the books, records, and papers of the business for period during which surviving partner fulfilled his obligations under Mississippi law to wind up the business and account for all interim profits to the estate of the decedent were not the personal papers of the surviving partner and with respect thereto he could not assert Fifth Amendment privilege; (3) with fact of noncompliance with enforcement order clearly and convincingly established, surviving partner's failure to testify, presumably resting on Fifth Amendment right not to testify, meant that he had failed to show cause why he should not be held in contempt of an outstanding order, but (4) order that attorney testify relative to surviving partner's tax liability could not validly expand the scope of the summons as issued and served.

Opinion clarified; petitions for rehearing denied.

1. Witnesses (Key) 306

Neither Government's "confession" nor surviving partner's tax return for period in question nor testimony of IRS agents were determinative of legal issue of whether business was partnership or proprietorship during period following death of one of two partners, for purposes of enforceability of IRS summons as against assertion of Fifth Amendment privilege. U.S.C.A.Const. Amend. 5.

2. Internal Revenue (Key) 1460

In proceeding for enforcement of IRS summons, record established that the Government had at all times sought "partnership" records for particular year at issue.

3. Partnership (Key) 251

Under Mississippi law in effect prior to enactment of the Uniform Partnership Act, surviving partner, vis-a-vis the heirs and legatees of deceased partner, stood in the same shoes as an administrator, with status of trustee, and could not thereafter legally proceed as a sole proprietor, but operated business in a fidcuiary capacity. Code Miss. 1942, §§ 553-560.

4. Partnership (Key) 243, 255(1)

Under Mississippi law, when partner dies, in the absence of a prior agreement providing for the continuation of partnership after death, the partnership is dissolved, but dissolution does not mean the partnership thereby instantaneously disappears; for various purposes, it continues to live until it is lawfully sold or its affairs have been lawfully wound up, and the surviving partner does not become the sole proprietor of the partnership or its assets.

5. Partnership (Key) 251, 255(4)

Surviving partner, as executor of the estate of his deceased partner, owed deceased partner's legatees the fiduciary duties of a trustee, and for the purpose of accounting for any profits realized by virtue of his continued employment of the partnership assets, the partnership was still alive under Mississippi law, and its books and records were not the private property of the surviving partner.

6. Witnesses (Key) 306

Where partnership continued in existence by operation of law following death of one of two partners until surviving partner fulfilled his obligations under Mississippi law to wind up the business and account for all interim

profits to the estate of the decedent, the books, records and papers of the business during that period were not the personal papers of the surviving partner, with result that he could not assert his Fifth Amendment privilege in response to IRS summons. U.S.C.A.Const. Amend. 5.

7. Internal Revenue (Key) 1460

Where fact of noncompliance with district court's previous order enforcing IRS summons was clearly and convincingly established, failure of person summoned to testify at contempt hearing, presumably resting on his Fifth Amendment right not to testify, meant that he failed to show cause why he should not be held in contempt of an outstanding order. U.S.C.A.Const. Amend. 5.

8. Internal Revenue (Key) 1460

District court's order in IRS summons enforcement proceeding was final and appealable. 28 U.S.C.A. § 1291.

9. Internal Revenue (Key) 1456, 1460

Statutory subsection with respect to enforcement of IRS summons, providing that "the District Court of the United States for the district in which such person resides or may be found" shall have jurisdiction for enforcement is in the nature of a venue provision which can be waived, and preceding subsection is the general jurisdictional statute. 26 U.S.C.A. (I.R.C.1954), § 7402(a, b); 28 U.S.C.A. § 1345.

10. Witnesses (Key) 184(2)

State law does not determine its scope of attorney-client privilege in federal court; rather, federal common law determines the scope of the privilege.

11. Internal Revenue (Key) 1460

Order in IRS summons enforcement proceeding did not prevent attorney from properly raising attorney-client privilege in subsequent proceedings. Federal Rules of Evidence, rule 501, 28 U.S.C.A.

12. Internal Revenue (Key) 1460

Order enforcing IRS summons could not validly expand the scope of the summons as issued and served.

Appeals from the United States District Court for the Northern District of Mississippi.

ON PETITIONS FOR REHEARING AND
PETITIONS FOR REHEARING
EN BANC

(Opinion January 12, 1978, 5 Cir., 1978, 565 F.2d 1344).

Before COLEMAN, SIMPSON and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge.

No member of this panel nor Judge in regular active service on the Court has requested that the Court be polled on rehearing en banc (Fed.R.App.P. 35; Local Fifth Circuit Rule 12). Therefore, the various Petitions for Rehearing En Banc are denied.

The panel which originally heard and decided these appeals has nevertheless thoroughly re-examined the issues and finds that it must adhere to the previously rendered opinion, *United States* v. *Hankins*, 5 Cir. 1978, 565 F.2d 1344.

We consider it not out of order, however, to state additional reasons supporting the results announced in that

opinion.[1] We also grant the government's request for clarification as to one aspect of the case affecting Mr. Montgomery.

I. *The Hankins Appeal, No. 76-3467*

In our prior opinion, we held that partnership records have no Fifth Amendment immunity to subpoenas in Internal Revenue investigations of tax liability. This clearly covered the partnership records in existence prior to the death of Mr. Bewel Hankins on November 19, 1971.

For the reasons stated in the opinion, we also held that the same rule applied to the Hankins' records for 1972.

As we noted before, 565 F.2d at 1349, much of the confusion surrounding the 1972 records was caused by "the Revenue Agent and the Attorney for the Department of Justice uniformly [referring] to the 1972 operations as a sole proprietorship". We are entirely convinced that the operations in 1972 were not, and could not have been, the activities of a sole proprietorship. This may affect the individual tax liability of A. Burton Hankins for that year, but that issue is not involved in the case at this point.

1. We consider Hankins' petition for rehearing to embrace the period of time from November 19, 1971, when his brother and partner, Bewel Hankins, died, to January 2, 1973, when the new corporation, Hankins Lumber Company, Inc., was formed. It is Hankins' contention that the business was operated as a sole proprietorship during that time, and that the records of that sole proprietorship are his personal records, which, according to Hankins, are protected by the Fifth Amendment. He has not requested a rehearing on our affirmance of the District Court's orders enforcing the summonses seeking the papers related to the estate taxes of Bewel Hankins, the Boswell audit papers, and the partnership records dated prior to November 19, 1971. In connection with this petition, we have reexamined those holdings and are convinced that they are correct. We therefore consider only the records of the lumber business from November 19, 1971, to January 2, 1973, but we shall refer to them as "the 1972 records."

Mr. A. Burton Hankins' arguments for rehearing may be grouped into two categories: (1) that the government never sought the 1972 records, and (2) that, in any case, those records are nevertheless the records of a sole proprietorship (private papers) which he cannot be forced to produce.

[1, 2] As for the first point, we think it best to begin at the beginning. The summons in question, served on Burton Hankins on March 10, 1975, sought production of "[a]ll records in your possession pertaining to the Hankins Lumber Company partnership for the years 1968, 1969, 1970, 1971, and *1972* . . . . (emphasis added)." Hankins appeared in response to the summons, but refused to turn over the summonsed documents. The United States filed a petition to enforce the summons, the District Court held a consolidated hearing on March 1, 1976, and issued its Memorandum of Decision on July 15, 1976. It was found as a matter of fact that the two brothers had operated a jointly owned partnership "[f]rom approximately 1957 until November 19, 1971 . . . ." The District Judge also drew the legal conclusion that the partnership had terminated on the death of Bewel Hankins.[2] On August 10, 1976, the District Judge ordered Hankins to produce, *inter alia*, "[a]ll records in your possession pertaining to the Hankins Lumber Company partnership for the years 1968, 1969, 1970, 1971, and *1972* . . . ." It therefore seems

2. These findings track the stipulation of the parties that the partnership terminated at the death of one of the partners. (R. 79). Hankins also makes much of the government's "concession" of this point, as well as the fact that the government introduced Hankins' tax returns for the period in question into evidence. Those returns indicate that he operated the lumber business as a "sole proprietorship." We think that neither the "concession", nor the tax returns, nor the testimony of the IRS agents are determinative of the legal issue involved, namely, was this business a partnership or a proprietorship during the period between Bewel's death and the incorporation?

clear to us that the government has at all times sought the "partnership" records.

Consequently, we move to the second point.

The Hankins partnership existed by virtue of Mississippi law, so it is to that law that we turn for a rule of decision. At the time of the death of Bewel Hankins, Mississippi had not yet enacted its version of the Uniform Partnership Act.[3] The partnership, therefore, was governed by the common law, except where modified or supplemented by statute. In 1971, the only relevant statutes which we have been able to uncover were found in Miss. Code Ann. §§ 553-560 (1942).[4] These sections regulated the executor or administrator of a deceased partner's estate and prescribed what actions he shall take for the benefit of heirs, devisees or legatees. With the approval of the chancellor, the executor or administrator might sell the decedent's interest in the partnership estate. *Id.* at § 553. He shall also conduct an inventory of the partnership accounts. *Id.* at § 554. Once the appraisal is completed, he may take control of such an amount of the partnership

3. The Mississippi Uniform Partnership Act became effective April 1, 1977, and is now codified at Miss. Code Ann. §§ 79-12-1 through 79-12-85 (1977 Supp.). That Act provides that dissolution is caused by the death of one of the partners, unless the partnership agreement provides to the contrary. Miss. Code Ann. § 79-12-61(4) (1977 Supp.). However, it also provides that "[o]n dissolution, the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Miss. Code Ann. § 79-12-59 (1977 Supp.) Upon the death of a partner, the partnership may be continued with the consent of the deceased's representative, who then assumes the status of a creditor entitled to his share of the partnership with interest or a proportionate share of the profits. Miss. Code Ann. § 79-12-83 (1977 Supp.). We cite these provisions, not because they are dispositive (since they are not), but because they do provide some insight into the law of the State of Mississippi in 1971.

4. These statutes were carried forward in the 1972 Code in §§ 91-7-119 through 91-7-133. These sections were subsequently repealed when the Legislature enacted the Mississippi Uniform Partnership Act. 1976 Miss. Laws ch. 407, § 44.

assets as will equal the decedent's interest, or he may allow those assets to be managed by the surviving partner, who must then post a bond. *Id.* at §§ 554-555. This bond should be an amount equal to the value of the partnership estate and not merely that of the interest of the deceased partner, *Gurley* v. *Gurley*, 77 Miss. 413, 26 So. 962 (1900).[5]

In the event that the surviving partner declines to act, the executor or administrator shall post bond, take possession of the assets, and liquidate. Miss. Code Ann. §§ 558-559 (1942). Furthermore, the surviving partner is under a duty to exhibit all partnership property to the appraiser. If the executor must administer the estate, the surviving partner is under a further duty to turn over "books and papers and all necessary documents". *Id.* at § 560. Although the Code does refer in two places to the "trust" obligations of the executor or administrator, those two sections are only applicable if the surviving partner declines to account. *See id.* at §§ 559-560.

Section 557, however, provides:

> The court shall have the same authority to cite such surviving partner to account, and to adjudicate upon his accounts as in the case of an administrator; and the parties interested shall have the like remedies on such bond for any misconduct or neglect of the survivor as may be had against administrators.

[3] Since the status of an administrator is defined by statute to be that of a trustee, and since interested

5. This bond was not posted until the appraisal had been completed. Hankins, in his petition to the Chancery Court, asserted that liquidation of the business would result in "tremendous financial loss to the Estate" and that the book value might not represent the true value of the partnership assets. (R. 422). He therefore requested permission to continue the business.

parties, namely the heirs of the deceased partner, have the same remedies against the survivor as against an administrator, again as provided by statute, it follows *a fortiori* that vis-a-vis heirs and legatees the surviving partner stands in the same shoes as an administrator, namely that of a trustee and he cannot thereafter legally proceed as a sole proprietor.

A surviving partner, who accepts his statutory obligations and proceeds to satisfy the claims of the heirs of his deceased partner, operates the business in a fiduciary capacity. In *Gurley* v. *Gurley, supra,* the Court unequivocally stated, "At law, upon the death of one of the partners the surviving partner is invested with the title and possession of the partnership property, *but in equity* [emphasis added] he is a trustee for all parties concerned . . . ." 26 So. at 962. The Court left no doubt about the status of the surviving partner by saying that any "hardship [caused by the bond requirement] may be soon removed by a speedy execution of the trust". 26 So. at 963.[6]

Statutory law made Burton Hankins a trustee, and so did the common law of Mississippi. In *Robertshaw* v. *Hanway,* 52 Miss. 713 (1876), a case decided prior to the first enactment of partnership statutes in 1892, the Court was confronted with a claim against a dissolved partnership. In the course of its opinion, the Supreme Court stated:

> "upon a dissolution of a firm, by the death of one of its members, the credits and personal effects vest, by operation of law, in the survivors, and under judgment against them the effects of the firm may

6. This was apparently one of the first cases to authoritatively construe the statute which was the direct predecessor to Miss. Code Ann. § 91-7-123 (1972). No later case has repudiated that language.

> be sold. The real estate, however, preserves its distinct qualities and descends to the heir of the decedent, who holds in common with the survivor in trust for the purposes of the partnership, first for the creditors, and, second for the members of the firm and their representatives, according to their several interests." 52 Miss. at 716.

We look next to the case of *Mayson's Administrator* v. *Beazley's Administrator,* 27 Miss. 106 (1854) which in the 124 years since it was handed down has never been undercut by any subsequent statute or Mississippi Supreme Court decision. Mayson and Beazley formed a partnership for the purchase and operation of a sawmill (a type of activity quite similar to that which we have in the instant case). After a year or so, Beazley died and Mayson continued to operate the business, allegedly realizing large profits for which he failed to account to Beazley's administrator. The latter then sued and won a large judgment in the lower court, whereupon Mayson appealed, complaining primarily about the exclusion of certain of his evidence. The Court held that Beazley's administrator could recover a share of the profits earned *after Beazley's death* and that Mayson was entitled to prove his legitimate expenses. The Court also delivered itself of a full exposition on the law governing the dissolution of partnerships. We quote it in full because of its clarity and its important relevance to this case:

> By the death of Beazley the partnership was dissolved. The legal title to the property survived to Mayson only for the purpose of enabling him to pay the copartnership debts. As to the beneficial interest in the property, Mason and Beazley's representatives were tenants in common. It was the right of the representative of the deceased partner to call for an

account at any time, and Mayson's duty to give it when demanded. Till the account was given, or the business closed by a sale of the property, a court of equity will, for certain purposes, regard the partnership as still in existence, and will require the survivor to account for whatever profits he may have made by the use of the property or the employment of the joint capital. Or, to state the proposition in a few words, if the survivor has made profits he must account for them upon the terms regulating the co-partnership; if he has made nothing by continuing the business, he is accountable only as a tenant in common. 27 Miss. at 112.

[4, 5] It is true, of course, that when a partner dies, in the absence of a prior agreement providing for the continuation of the partnership after death, the partnership is dissolved because the surviving partner cannot continue doing business with, for, or on behalf of a dead man. But dissolution does not mean that the partnership thereby instantaneously disappears. For various purposes, it continues to live until it is lawfully sold or its affairs have been lawfully wound up. The surviving partner does not become the sole proprietor of the partnership or its assets. Burton Hankins, as the executor of his brother's estate, owed Bewel's legatees the fiduciary duties of a trustee. For the purpose of accounting for any profits realized by virtue of his continued employment of the partnership assets, the partnership was still alive. Its books and records were not, and could not have been, the private property of Burton Hankins.[7]

---

7. Since *Mayson's Adm'r* states the common law of Mississippi one might conclude that present § 79-12-59 of the Miss. Code is a codification of that common law rule. *See* note 3, *supra*. This result under Mississippi law means that the partnership continued for federal income tax purposes. *See* Treas.Reg. §1.708-1(b)(1)(i)(a) (1978).

[6] When did the partnership terminate? Frances Hankins, Bewel Hankins' widow, on August 11, 1972, executed a quitclaim deed conveying her one-fourth interest in the partnership to Burton Hankins and the Chancery Court approved that sale the next day. On October 18, 1972, the Chancery Court granted a petition by Burton Hankins to purchase the remaining portion of the estate's interest in the partnership. A bill of sale and warranty deed, conveying to Burton the estate's interest in the partnership property and real estate, were executed on November 3, 1972, and December 14, 1972. However, there were special circumstances present here which extended the life of the partnership. In the proceedings before the Chancery Court there was testimony that it was the testator's wish that the children stay in the business, (R. 433), and the court so found. (R. 502). In its decree authorizing Burton Hankins to purchase the remaining interest of the estate in the partnership assets, the Chancery Court permitted the purchase "with the understanding that the guardian of the minor children of Bewel A. Hankins, deceased, will have the right to purchase stock for the children in an amount equal to the value of their interest in said former partnership assets, which said stock will be placed in a trust fund and administered by the Trustee, which trust is to be set up at the appropriate time." (R. 503). In its later order releasing Burton Hankins from his duties as executor, the Chancery Court "further decreed that the equitable interest of the three sons in the business formerly operated as a partnership known as Hankins Lumber Company, and which has now been incorporated as Hankins Lumber Company, Inc., should be converted to shares of stock in said corporation . . . ." Plainly, the court of equity regarded the partnership as continuing in existence until the business was incorporated. *See Mayson's Adm'r v. Beazley's Adm'r, supra.*

Thus, the books, records and papers of the lumber business from November 19, 1971, to January 2, 1973, were not the personal papers of Burton Hankins, but the papers of a partnership which continued in existence by operation of law until the surviving partner fulfilled his obligations under Mississippi law to wind up the business and account for all interim profits to the estate of the decedent. For this additional reason, we adhere to our earlier decision affirming the District Court's order that the summons to Mr. A. Burton Hankins be enforced. *Bellis* v. *United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974); *United States* v. *Greenleaf*, 5 Cir. 1977, 546 F.2d 123.

II. *Hankins' Appeal in No. 77-1967*

[7] In No. 77-1967, Hankins also petitions for rehearing. His argument is as follows: he did not have the records on the date of the contempt hearing, he cannot be cross-examined as to the reasons for the disappearance of the records, and he cannot be confined indefinitely when he lacks the ability to comply with the order of the District Court. He did not testify at the contempt hearing, nor did he present any evidence of inability to comply.[8] Among the citations in his brief, Hankins relies

8. When the court refused to allow Hankins to testify on the condition that he not be subject to cross-examination, counsel tendered an "offer of proof" to the effect that Hankins would have testified that he did not have the missing records at that time, nor when he appeared before the IRS agent in response to the summons, nor when the summonses were served. In view of our conclusion on the contempt citation, what was said by the Supreme Court in *Maggio* v. *Zeitz*, 333 U.S. 56, 69, 68 S.Ct. 401, 408, 92 L.Ed. 476 (1948), is especially relevant to Hankins' attempt to relitigate the District Court's earlier finding that Hankins had the records when the court ordered the summons enforced:

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does

(*Continued on following page*)

primarily on *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957); *Maggio* v. *Zeitz*, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948); *United States* v. *Rizzo*, 5 Cir. 1976, 539 F.2d 458; and *Cagle* v. *Scroggins*, 5 Cir. 1969, 410 F.2d 741. None of these cases aids Hankins.

In *Maggio*, the Court reversed a court of appeals decision affirming a coercive sanction when the latter court was absolutely convinced that Maggio could not comply with the order. The critical difference between *Maggio* and the present case is that Maggio himself *had* testified and *had* subjected himself to cross-examination. In *Cagle* and *Rizzo*, both individuals testified that they were unable to produce the records demanded and both were subject to cross-examination. In *Curcio*, the Court reversed a criminal contempt conviction of an individual for invoking his Fifth Amendment privilege and refusing to testify as to the whereabouts of corporate records which he had not produced in response to a subpoena duces tecum, but *Curcio* did not involve a refusal to testify in a contempt proceeding. The difference between *Curcio* and this case is that in the contempt proceeding here, the court ordered Hankins to appear and show cause why he could not be held in contempt for disobeying a prior order. With the

Footnote continued—

> not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place.

fact of non-compliance with the court's previous order clearly and convincingly established, Hankins' failure to testify, presumably resting on his Fifth Amendment right not to testify, means that he has failed to show cause why he should not be held in contempt of an outstanding order.[9]

III. *Montgomery's Case*

Subsequent to the publication of our opinion in these two cases consolidated on appeal, the government filed a motion for clarification of the Court's decision with respect to appellant Montgomery in No. 76-3467. Montgomery filed a petition for rehearing.

[8] Both the government and appellant Montgomery point out that our opinion did not specifically address Montgomery's appeal from the lower court's order in the summons enforcement proceeding.[10] Although our opinion did state that "[t]he other errors assigned by the respective appellants have been duly considered and found to be without merit," 565 F.2d at 1352, we now believe that a clarification is not out of order.

---

9. Of course, should Hankins produce the records or become willing to testify, criminal contempt proceedings might then be appropriate. *See United States* v. *Rizzo*, 5 Cir. 1976, 539 F.2d 458; 18 U.S.C. § 401; Fed.R.Crim.P. 42.

10. This order was a "final" order for purposes of 28 U.S.C. § 1291 and therefore appealable. *Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964); *United States* v. *Malnik*, 5 Cir. 1974, 489 F.2d 682; *United States* v. *Roundtree*, 5 Cir. 1970, 420 F.2d 845. Our earlier holding that Montgomery's appeal in No. 77-1967 must be dismissed due to the lack of a final order implicitly declined to convert the appeal into a petition for mandamus or an interlocutory appeal under 28 U.S.C. § 1292(b). That holding has not been challenged by the parties, and we adhere to it.

[9-11] The most basic argument[11] is that Mr. Montgomery should not be compelled to give general oral testimony concerning communications privileged by virtue of the attorney-client relationship. Montgomery apparently argues[12] that the District Court improperly ordered him to testify generally and precluded Montgomery from raising any proper claims of attorney-client privilege. He bases his argument on the sentence in the District Court's Memorandum of Decision which states that "orders will be issued requiring each individual respondent to appear before Special Agent Grant or his authorized representative to be sworn and to give testimony or to claim a *personal* privilege as to particular questions." 424 F.Supp. at 613 (emphasis in original). It seems clear to us that the District Judge had no intention of ignoring the rule that the attorney-client privilege may be asserted either by the client or by the attorney on behalf of the client, in the absence of waiver or some other recognized excep-

---

11. Montgomery also contests the jurisdiction of the District Court to enforce the summons and cites the appropriate statute, 26 U.S.C. § 7402(b), which grants jurisdiction to "the district court of the United States for the district in which such person resides or may be found . . . ." Montgomery characterizes this statute as a grant of subject matter jurisdiction, but we think this assertion incorrect. It seems that 26 U.S.C. § 7402(a) is the general jurisdictional statute, and that statute specifically states that the remedies which it provides are not exclusive. 28 U.S.C. § 1345 also provides jurisdiction here. We therefore conclude that the language upon which Montgomery relies is in the nature of a venue provision. It is elementary that venue can be waived if not timely raised, *see generally* C. Wright, A. Miller & E. Cooper, 15 Federal Practice and Procedure § 3829 (1976), and the lower court properly found that Montgomery had so waived his challenge. *See United States* v. *Hankins*, 424 F.Supp. 606, 612-13 (N.D.Miss. 1976). Any objections to the service of process or jurisdiction over the person of Montgomery were also waived. See Fed.R.Civ.P. 12(b)(1).

12. We use the word "apparently" because many of his factual arguments relate to what actually occurred at the hearings. In No. 76-3467, however, we are concerned only with the validity of the summons enforcement order.

tion to the assertion of the privilege. *See generally Fisher* v. *United States*, 425 U.S. 391, 403-405, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); Fed.R.Evid. 501;[13] 8 J. Wigmore, Evidence § 2324 (McNaughton rev. ed. 1961) ("That the *attorney* himself is prohibited [from disclosing his client's confidences], whether he is willing or not, is of course the fundamental assumption of the modern theory.") Indeed, the District Court's opinion clearly indicates that he understood this rule, for he stated that Montgomery could neither claim a *blanket* attorney-client privilege nor assert another *person's personal* privilege against self-incrimination. Neither the Memorandum of Decision nor the subsequent order prevents Montgomery from properly raising the attorney-client privilege in subsequent proceedings. Furthermore, the record indicates that the government never sought to compel Montgomery to divulge any information in violation of the privilege. (R. 303). What we said in our original opinion relative to Hankins is therefore equally applicable to Montgomery:

> The requirement that Mr. [Montgomery] testify before the Internal Revenue Agent is, of course, subject to the rule prevailing in this Circuit that he must appear in response to the summons, thereafter the Internal Revenue Service must propound specific questions, and the witness may then claim the privilege as to each question, *United States* v. *Malnik*, 5 Cir. 1974, 489 F.2d 682; *United States* v. *Roundtree*, 5 Cir. 1970, 420 F.2d 845.

United States v. *Hankins, supra*, 565 F.2d at 1349-50.

[12] The final point which Montgomery raised in his appeal was an argument that the District Court's order expanded the scope of the summons. The investigation concerned Hankins' tax years 1969 through 1973, but the summons to Montgomery sought testimony only for the years 1969 through 1972. Nevertheless, the District Court ordered Montgomery to testify relative to Hankins' tax liability for 1973. Upon re-examination, we conclude that the order could not validly expand the scope of the summons as issued and served and that the order should be modified so that it will clearly indicate that Montgomery is required to testify regarding only the years 1969 through 1972, but not in violation of the attorney-client privilege, as the summons indicated. Although it is the rule in this Circuit that a District Court has some discretion to modify a summons in order to remove ambiguities or to cure the summons of overbreadth, *United States* v. *Malnik*, 5 Cir. 1974, 489 F.2d 682, 686 n.4,[14] the District Court does not have power to modify the summons in order to expand its scope. If the IRS needs the testimony of Montgomery relative to Hankins' tax liability for 1973, during which year Hankins' business was incorporated and for which the IRS already has the corporate records, it may consider the issuance of another summons to Montgomery and make the proper showing under *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964).

13. Contrary to the assumption of counsel for appellant Montgomery in the court below, (R. 60-61), state law does not determine the scope of the attorney-client privilege. This is a case in which federal law supplies the rule of decision, and the federal common law therefore determines the scope of the privilege. See Conference Rep. No. 93-1597, 93rd Cong., 2d Sess. 7-8, *reprinted in* [1974] U.S.Code Cong. & Admin.News pp. 7100-7101. For a similar holding by this Circuit prior to enactment of the Federal Rules of Evidence, see *Garner* v. *Wolfinbarger*, 5 Cir. 1970, 430 F.2d 1093, *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971).

14. *United States* v. *Solomon*, 5 Cir. 1971, 437 F.2d 110, is not to the contrary. That case simply affirmed a district court's refusal to enforce a summons on grounds of ambiguity, and there was no showing of abuse of discretion.

CONCLUSION

With the above clarification as to Mr. Montgomery's testimony for the year 1973, all petitions for rehearing are

DENIED.

APPENDIX C

UNITED STATES of America et al., Petitioners,

v.

A. Burton HANKINS et al., Respondents,

v.

Robert Lewis SMITH, Intervenor.

UNITED STATES of America et al., Petitioners,

v.

HANKINS LUMBER CO. et al., Respondents,

v.

Robert Lewis SMITH, Intervenor.

UNITED STATES of America et al., Petitioners,

v.

HANKINS LUMBER CO., INC., et al., Respondents.

UNITED STATES of America et al., Petitioners,

v.

A. Burton HANKINS et al., Respondents.

Nos. WC 75-107-S—WC 75-110-S.

United States District Court,
N. D. Mississippi, W. D.

July 15, 1976.

The Government sought to enforce summonses as issued by the Internal Revenue Service, and the District Court, Orma R. Smith, J., held that with respect to testimonial provisions of the summonses, none of the respon-

dents were entitled to invoke, in a blanket manner, his Fifth Amendment privilege against self-incrimination or his attorney-client privilege as a bar to giving of all testimony, nor could any respondent properly invoke another person's personal privilege against self-incrimination as a bar to giving his own testimony. Even if no waiver of privilege occurred and even if the client desired an attorney-client privilege to be asserted, an estate settlement agreement and details of audit could under no circumstances be deemed privileged where they had been shared with an adversary of the client and in no way could be construed as "confidential communications." Records of the estate created and maintained by an individual in his representative capacity as executor could not enjoy protection of his personal privilege against self-incrimination, and such records were not entitled to protection of such individual's Fifth Amendment privilege.

Order issued for production.

1. Internal Revenue (Key) 1451

Special agent was delegate of Secretary of Treasury and was authorized to issue summonses requiring parties' appearance and testimony and production of various books and records. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7602, 7604(a).

2. Internal Revenue (Key) 1451

Individual was to be found in district at time of trial when he appeared in person, and court had in personam jurisdiction over him under internal revenue statutes providing for jurisdiction and venue for judicial enforcement of summons in United States district court for district in which such person resides and is found. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a).

3. Courts (Key) 37(3)

Individual upon whom Internal Revenue Service summons was served and who appeared in person was estopped from contesting jurisdiction of court by virtue of waiver of any timely objection. 26 U.S.C.A. (I.R.C.1954) §§ 7402 (b), 7604(a).

4. Internal Revenue (Key) 1451
Witnesses (Key) 306, 307

With respect to testimonial provisions of summonses issued by Internal Revenue Service, none of respondents were entitled to invoke, in blanket manner, his Fifth Amendment privilege against self-incrimination or his attorney-client privilege as bar to giving of all testimony, nor could any respondent properly invoke another person's personal privilege aginst self-incrimination as bar to giving his own testimony. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a); U.S.C.A. Const. Amend. 5.

5. Witnesses (Key) 306

Corporation had no Fifth Amendment privilege against self-incrimination and would be required to produce knowledgeable witnesses who would not be incriminated by their testimony. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a); U.S.C.A.Const. Amend. 5.

6. Witnesses (Key) 222

With respect to invocation of attorney-client privilege on behalf of client as bar to testimony or production of estate settlement agreement, burden of proving both existence and extent of privilege is squarely upon party claiming it.

7. Witnesses (Key) 205

Even if no waiver of privilege occurred and even if client desired attorney-client privilege to be asserted, estate settlement agreement and details of audit could under no circumstances be deemed privileged where they had been shared with an adversary of client and in no way could be construed as "confidential communications."

8. Internal Revenue (Key) 1459

Where individual was employee or officer of corporation at time of preparation of federal corporate income tax return, work papers generated by preparation of return were not personal books or records of individual held in personal or private capacity but rather were corporate records enjoying no privileged status and were in constructive possession of corporation and its president, and corporation, its president and employee would be required to appear before special agent of Internal Revenue Service or authorized representative to produce such work papers. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a).

9. Witnesses (Key) 298

Records of estate created and maintained by individual in his representative capacity as executor could not enjoy protection of his personal privilege against self-incrimination, and such records, required to be created and maintained by probate laws of Mississippi, were not entitled to protection of such individual's Fifth Amendment privilege. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a); U.S.C.A.Const. Amend. 5.

10. Witnesses (Key) 298

Termination of decedent's estate was immaterial to question of privilege against self-incrimination as claimed

for executor's records; it was nature of records and not status of possessor or owner which controlled. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a); U.S.C.A.Const. Amend. 5.

11. Internal Revenue (Key) 1454

Where events suggested that taxpayer in acquiring audit papers was embarked upon course of action designed to obtain potential evidence against him before it fell into hands of Internal Revenue Service, such third-party evidence obtained in such manner and for such purpose could not be shielded from government inspection. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a); U.S.C.A.Const. Amend 5.

12. Witnesses (Key) 306

Partnership which was not "small family partnership" but was large, many-faceted commercial venture of long duration, with numerous employees, substantial assets and impressive gross receipts and interrelationship with two substantial closely held corporations was not entitled to assert personal privilege of former partner against self-incrimination to bar production of partnership records for inspection by Internal Revenue Service. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a); U.S.C.A.Const. Amend. 5.

13. Witnesses (Key) 298

Partnership records do not lose characteristic as such, as bearing upon privilege against self-incrimination with respect to production in response to internal revenue summons, because of termination of partnership. 26 U.S.C.A. (I.R.C.1954) §§ 7402(b), 7604(a); U.S.C.A.Const. Amend. 5.

H. M. Ray, U. S. Atty., William M. Dye, Jr., Asst. U. S. Atty., Oxford, Miss., for petitioners.

Hugh C. Montgomery, Jr., Dossett, Magruder & Montgomery, Jackson, Miss., J. N. Raines, Memphis, Tenn., Tommy M. McWilliams, Townsend, McWilliams & Holladay, Drew, Miss., Paul P. Lipton, Lipton & Petrie, Milwaukee, Wis., for respondents.

MEMORANDUM OF DECISION

ORMA R. SMITH, District Judge.

These related matters came on for a consolidated hearing before the court on March 1, 1976, pursuant to the court's orders to show cause; the parties were present by counsel; evidence was presented and the parties were heard. Due consideration having been had, the court enters the following findings of fact and conclusions of law.

A. *Findings of Facts.*

1. The petitioner Robert E. Grant is a special agent of the Intelligence Division of the Internal Revenue Service, United States Treasury Department, with post of duty in Jackson, Mississippi.

2. In his capacity as a special agent Grant was assigned to conduct an investigation of the federal income tax returns and liabilities of A. Burton Hankins of Grenada, Mississippi, for the years 1971, 1972, and 1973. The investigation also included the 1973 federal income tax return and liability of Hankins Lumber Company, Inc., Grenada, Mississippi, a Mississippi corporation of which A. Burton Hankins is the president and majority shareholder.

3. Special Agent Grant's investigation is a joint investigation being conducted in coordination with the Audit Division of the Internal Revenue Service. The Audit Division representative assigned to the investigation is Revenue Agent John Ervin.

4. The investigation is directed toward the 1971, 1972 and 1973 tax years of A. Burton Hankins and 1973 for the corporation. However, because of the complicated financial history of the taxpayers, the agents also need to determine Hankins' correct tax liabilities for the years 1969 and 1970.

5. From approximately 1957 until November 19, 1971, A. Burton Hankins and his brother, Bewel A. Hankins, operated a jointly owned partnership, the Hankins Lumber Company, which engaged in the planer mill and lumber business in Grenada County, Mississippi. In 1971, the partnership had 98 employees, assets of about $1 million, gross receipts of more than $3 million, and a payroll of almost one-half million dollars. The company purchased an average of more than 30 tracts of timber a year and during 1971, produced around 27 million feet of lumber.

6. In connection with their lumber operation, the Hankins brothers were also joint owners of two Mississippi corporations, Hankins Lumber Sales, Inc., which was incorporated on February 21, 1964, and Logging Industries, Inc., which was incorporated in April, 1966. As of April 26, 1972, the net assets of these corporations were appraised at $202,358.69, for Hankins Lumber Sales, Inc., and $52,-698.32, for Logging Industries, Inc.

7. The partnership maintained various business ledgers, journals and books of account. These records, which are the subject of Civil Action No. WC 75-108-S, are in the possession of A. Burton Hankins to whom the summons at issue there is directed.

8. On November 19, 1971, Bewel A. Hankins died at the age of 43. His last will and testament, which named his brother A. Burton Hankins as executor of the estate, was contested on November 23, 1971, by his widow,

Frances Hankins. *In re Estate of Bewel A. Hankins,* No. 12,200 (Grenada Cty., Miss.Ch.Ct. May 8, 1971). Mrs. Hankins was represented in that matter by the respondent, Attorney Tommy M. McWilliams of Drew, Mississippi.

9. On January 11, 1972, Mrs. Hankins petitioned the Grenada County Chancery Court for appointment as temporary administratrix of the Estate of Bewel A. Hankins. On January 21, 1972, the Chancery Court ordered the will admitted to probate and appointed A. Burton Hankins Executor of the Estate of Bewel A. Hankins.

10. On February 11, 1972, Frances Hankins renounced the will and elected to receive a one-fourth share of the net estate.

11. On August 11, 1972, Mrs. Hankins filed a petition to terminate her interest in the Estate of Bewel A. Hankins which reflected the sale of her one-fourth interest in Hankins Lumber Company to A. Burton Hankins, the surviving partner. On August 12, 1972, the Chancery Court granted this petition.

12. On October 18, 1972, the Chancery Court granted a petition by A. Burton Hankins to purchase the remaining portion of the Estate's interest in the Hankins Lumber Company partnership.

13. In his capacity as Executor of the Estate of Bewel A. Hankins, A. Burton Hankins created or caused to be created and maintained various books, records, and papers pertaining to the administration, probate and settlement of the Estate. These records include the papers relating to preparation and filing of the Federal and Mississippi estate tax returns, appraisal of the assets of the state, payment of creditors, settlement of the will contest, and closing out the Estate. These records, which are the subject of Civil Action No. WC 75-110-S, are in the possession

of Robert Lewis Smith and A. Burton Hankins, to whom the summonses at issue therein are directed.

14. During pendency of the will contest, Attorney McWilliams, on behalf of Frances Hankins, caused an audit of the partnership books and records to be performed by Certified Public Accountant William S. Boswell, Drew, Mississippi. This audit resulted in the creation of reports, schedules, memoranda, correspondence, and other writings by Certified Public Accountant Boswell. In connection with the will litigation, Attorney McWilliams and his law firm also prepared or caused to be prepared certain documents, reports, correspondence, files, etc.

15. Although the will litigation between Mrs. Hankins and A. Burton Hankins, Executor and surviving partner, was concluded by agreement in about August, 1972, Certified Public Accountant Boswell continued to retain his audit papers until about June 26, 1974, and the papers of the widow's lawyers (McWilliams and his law firm) were retained by them until July 2, 1974.

16. On October 27, 1972, the Hankins Lumber Company was incorporated as a Mississippi corporation with A. Burton Hankins as president and majority shareholder. This implemented a decision which had been made prior to September 15, 1972.

17. The respondent, Robert Lewis Smith, is a Certified Public Accountant in Grenada, Mississippi. He prepared and signed the 1971 Hankins Lumber Company federal partnership return as well as the 1971 and 1972 personal federal income tax returns of A. Burton and Juanita Hankins. He also prepared and signed the federal estate tax return for the Estate of Bewel A. Hankins and the 1973 federal corporate income tax return for Hankins Lumber Company, Inc.

18. The evidence reflects that prior to October, 1973, Smith was in the private practice of accountancy with an office in Grenada, Mississippi. However, on or about October 1, 1973, Smith sold his accounting practice and moved his books, records, and workpapers and the corporate books and records of Hankins Lumber Company, Inc., to an office in the offices of Hankins Lumber Co., Inc., in Elliott, Mississippi.

19. In performing the various accounting services described above, Smith created and retained various accounting workpapers, books, and records. These workpapers and records, which are the subject of Civil Action Nos. WC 75-109-S and WC 75-110-S, are in the possession of Robert Lewis Smith, to whom one of the summonses at issue therein was directed.

20. In November of 1973, Revenue Agent Ervin began an audit of the 1971 partnership of Hankins Lumber Company and the individual returns of the two partners which would reflect the distribution of the partnership income from that year. In addition he undertook an audit of the returns of three closely held Hankins corporations with fiscal years ending March 31, 1972. Revenue Agent Ervin conducted the audits with the assistance of CPA Smith, who represented Hankins and the companies. In January, 1974, Revenue Agent Ervin advised CPA Smith that he needed to examine the subsequent year records (1972) of the lumber company. Smith advised Revenue Agent Ervin that Attorney Hugh Montgomery had the 1972 records in Jackson, Mississippi, and was making an analysis of them which would be helpful to Ervin and facilitate his audit. Ervin was able to work around this delay by conducting the audits of the closely held corporations. However, by May, 1974, he had completed the collateral audits and continued to request the 1972 lumber company records.

21. In late March or early April of 1974, the taxpayer, A. Burton Hankins, requested Attorney Tommy M. McWilliams to turn over to the taxpayer all books, records, and papers relating to the Boswell audit of the partnership and the will contest. This was ostensibly in furtherance of the settlement of the Estate reached in 1972.

22. On May 7, 1974, A. Burton Hankins petitioned the Chancery Court for approval of the final accounting of the Estate of Bewel A. Hankins and for his discharge as Executor of the Estate.

23. On May 8, 1974, the Chancellor of the Grenada County Chancery Court entered an order approving the final accounting and disbursements of assets and ordering the Estate of Bewel A. Hankins closed and the Executor, A. Burton Hankins, released and discharged.

24. On June 13, 1974, Revenue Agent Ervin met with Attorney Montgomery and advised him that although there were discrepancies in the partnership return in excess of $100,000 for 1971, he could not complete the 1971 audit without inspecting the 1972 records. Montgomery appeared to acquiesce in the 1971 discrepancies but insisted on closing the audit for that year before producing the 1972 lumber company records. Revenue Agent Ervin was unwilling to close 1971 without an inspection of the 1972 records. At that point Attorney Montgomery advised Revenue Agent Ervin that he would have to consult with his client, A. Burton Hankins, about producing the 1972 records.

25. On June 26, 1974, Attorney McWilliams sent a letter to CPA Boswell acknowledging delivery from Mr. Boswell to McWilliams' law firm of all reports, schedules, memoranda, correspondence, and other writings relating to the will contest. On that same date Mr. McWilliams

drafted a letter to Mr. Burton Hankins agreeing to the turnover of all Boswell papers as well as all McWilliams' documents, reports, correspondence, files, etc. The actual turnover, according to Attorney McWilliams, took place on July 2, 1974, when Attorney McWilliams physically delivered these records to A. Burton Hankins.

26. Revenue Agent Ervin, in the meantime, had had an appointment with Attorney Montgomery on July 3, 1974, to learn if the taxpayer was going to produce the 1972 records. This appointment had to be cancelled and Revenue Agent Ervin was then contacted by Attorney Montgomery on July 8, 1974, and advised that the 1972 records would not be produced because they might tend to incriminate A. Burton Hankins.

27. Based upon the discrepancies previously described, certain informant information items, and Attorney Montgomery's representation that production of the 1972 records would be refused because they might tend to incriminate the taxpayer, Revenue Agent Ervin determined the likelihood of tax fraud, and on July 21, 1974, referred the matter to the Intelligence Division where the present joint investigation was initiated.

28. Thereafter, in furtherance of the investigation Special Agent Grant determined that it would be necessary to inspect (A) the partnership records of Hankins Lumber Company; (B) the records of the Estate of Bewel A. Hankins; (C) the corporate records of Hankins Lumber Company, Inc.; and (D) the Boswell audit papers of the Hankins Brothers partnership. To that end he issued seven summonses to the various parties to these transactions requiring their appearance, testimony, and production of the various books and records.

29. Each of the summoned parties appeared as required by the summonses, but declined on varying grounds to testify or, with one exception, to produce the summoned documents. Special Agent Grant did not pursue the matter by asking specific questions. The exception was the production of all required corporate books and records of Hankins Lumber Company, Inc., except for the accounting workpapers used to prepare the 1973 corporate return.

30. Each of the respondents in these four cases, with the exceptions of Attorneys Hugh C. Montgomery and Tommy M. McWilliams, acknowledged to the court that he had in his possession, in whatever capacity, the summoned records. Respondent Montgomery denied that he had in his possession at the time of the issuance of the summons to him the records demanded by that summons (the Boswell audit papers). The government accepted that representation and deemed the *duces tecum* provision of the summons to Montgomery complied with.

31. The government's own proof demonstrated that Attorney McWilliams had turned over all his records relating to the will contest (including the Boswell audit papers) to A. Burton Hankins in furtherance of the estate settlement agreement. The only item still in McWilliams' possession is the original settlement agreement between Frances Hankins and A. Burton Hankins. McWilliams was unwilling to produce that document because his client had requested him not to (on grounds not otherwise specified).

32. Special Agent Grant testified that Mrs. Frances Hankins had cooperated with the Internal Revenue Service completely in the investigation and had not refused to give information or invoked any privilege.

33. Each of the individual respondents has knowledge and information pertaining to the tax liabilities under in-

vestigation. In addition, Hankins Lumber Company, Inc., has employees with knowledge and information pertaining to the tax liabilities under investigation.

34. The government presented the testimony of Leonard Parnell, a former employee of Certified Public Accountant Smith, Special Agent Grant, Revenue Agent Ervin, and Attorney Tommy M. McWilliams and offered into evidence 18 exhibits, all of which were received. In addition the government proposed several stipulations of fact which were agreed to by respondents in open court.

35. The respondents (other than Attorney McWilliams who was called as a government witness) did not testify and presented no witnesses. The only evidence presented by the respondents consisted of six documents relating to the administration and settlement of the Estate of Bewel A. Hankins and a letter from the District Director of Internal Revenue accepting the estate tax return of the Estate of Bewel A. Hankins as filed.

36. No recommendation for criminal prosecution has been made by the Internal Revenue Service to the United States Department of Justice in this investigation.

B. *Conclusions of Law.*

1. The court has jurisdiction over these actions and the parties pursuant to Int.Rev.Code of 1954, §§ 7402(b), 7604(a).

[1] 2. Special Agent Grant is a delegate to the Secretary of the Treasury authorized to issue the summonses involved in these actions. Int.Rev.Code of 1954, § 7602; Treas.Reg. § 301.7602-1; 26 C.F.R. § 301.7602-1 (1975).

3. The government has demonstrated by a preponderance of credible evidence that the joint investigation

of Special Agent Grant and Revenue Agent Ervin is being conducted for a legitimate purpose: The determination of the correct tax liabilities of A. Burton Hankins and Hankins Lumber Co., Inc., and the correctness of their federal income tax returns; that the summoned records and testimony may be relevant to the liabilities and returns under investigation; and that the information sought is not already in the government's possession. *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964).

4. With one exception the government has also demonstrated that in each instance the administrative steps required by the Internal Revenue Code have been followed. *United States* v. *Powell, supra.*

[2, 3] 5. The exception pertains to the summons issued on March 14, 1975, to Hugh C. Montgomery. The summons issued to Mr. Montgomery was issued and served in Jackson, Mississippi, in the Southern Judicial District of Mississippi and required Mr. Montgomery's appearance in that same district. Under 26 U.S.C. §§ 7402(b), 7604(a) jurisdiction and venue for judicial enforcement of such a summons is in "the United States district court for the district in which such person resides or *is found* . . . ." (Emphasis added) (*Id.* at § 7402(b)). As reflected in the government's opposition to respondent Montgomery's post-trial attack on the jurisdiction of this court, Mr. Montgomery was permitted by Special Agent Grant, as a personal accommodation to Mr. Montgomery, to respond to the summons at the office of the Internal Revenue Service, Room 315, Federal Building, 200 Washington Street, Greenwood, Mississippi, within the Northern District of Mississippi and the jurisdiction of this court. It was, therefore, within this district and the jurisdiction of this court that Mr. Montgomery was to be found when

he failed to comply with the summons addressed to him. Moreover, since this summons was part and parcel of an investigation involving six other related summonses, all issued, returnable, and enforceable in the Northern District of Mississippi, it was consolidated with the other summonses by the government for enforcement in this district. The respondent failed to raise this issue until the case had been consolidated and tried by this court and he was certainly to be found in this district at the time of trial when he appeared in person. Therefore the court had and has *in personam* jurisdiction over Mr. Montgomery pursuant to 26 U.S.C. §§ 7402(b) and 7604(a). Furthermore, the respondent is estopped from contesting the jurisdiction of this court at this time, by virtue of his waiver of any timely objection.

6. None of the respondents has sustained his burden of showing that the summonses here were issued in bad faith or for an improper purpose. The government has demonstrated and the court finds that each of the summonses was issued in good faith and for a proper purpose. *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *United States* v. *Powell*, *supra*.

[4, 5] 7. With respect to the testimonial provisions of the summonses at issue, none of the respondents is entitled to invoke, in a blanket manner, his Fifth Amendment privilege against self-incrimination or his attorney-client privilege as a bar to the giving of all testimony. *United States* v. *Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927); *United States* v. *Ellsworth*, 460 F.2d 1246 (9th Cir. 1972); *United States* v. *Roundtree*, 420 F.2d 845 (5th Cir. 1969). *See also United States* v. *Sigelbaum*, 27 Am. Fed.Tax R.2d 71-762 (S.D.Fla.1970), *aff'd per curiam*, 435 F.2d 1313 (5th Cir. 1971). Nor may any respondent properly invoke another persons' personal privilege against self-

incrimination as a bar to the giving of his own testimony. *Schulze* v. *Rayunec*, 350 F.2d 666 (7th Cir.), *cert. denied*, 382 U.S. 919, 86 S.Ct. 293, 15 L.Ed.2d 234 (1965); *Geurkink* v. *United States*, 354 F.2d 629 (7th Cir. 1965); *Genecov* v. *Federal Pettroleum Board*, 146 F.2d 596 (5th Cir. 1944) *cert. denied*, 324 U.S. 865, 65 S.Ct. 913, 89 L.Ed. 1420 (1945); *United States* v. *Conte*, 300 F.Supp. 73 (D.Del. 1969); *United States* v. *Learner*, 298 F.Supp. 1104 (S.D. Ill.1969); *United States* v. *Zakutansky*, 278 F.Supp. 682 (N.D.Ind.), *aff'd*, 401 F.2d 68 (7th Cir. 1968); *In re Fahey*, 192 F.Supp. 492 (W.D.Ky.), *aff'd*, 300 F.2d 383 (6th Cir. 1961). Consequently, orders will be issued requiring each individual respondent to appear before Special Agent Grant or his authorized representative to be sworn and to give testimony or to claim a *personal* privilege as to particular questions. An order will also issue requiring the respondent, Hankins Lumber Company, Inc., to designate officers, agents, or employees with knowledge of the required information to appear before Special Agent Grant or his authorized representative to be sworn and to give the required testimony. *United States* v. *Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970). The corporation has, of course, no Fifth Amendment privilege against self-incrimination and will be required to produce knowledgeable witnesses who will not be incriminated by their testimony. *Id.*

[6, 7] 8. With respect to respondent McWilliams' invocation of attorney-client privilege on behalf of his client, Frances Hankins, as a bar to his testimony or production of the estate settlement agreement, the burden of proving both the existence and the extent of the attorney-client privilege is squarely upon the party claiming it. *Bouschor* v. *United States*, 316 F.2d 451 (8th Cir. 1963); *Colton* v. *United States*, 306 F.2d 633 (2nd Cir. 1962), *cert.*

denied, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963); *United States* v. *Kovel*, 296 F.2d 918, 923 (2d Cir. 1961); *Mattson* v. *Cuyuna Ore Co.*, 178 F.Supp. 653, 654 (D.Minn. 1959). Not only did McWilliams fail to demonstrate the existence of any privileged communications between himself and his client, he failed even to demonstrate that the client, to whom any such privilege belongs, desired its invocation. Indeed, the government's proof was to the contrary. Finally, even assuming the existence of a privileged relationship, assuming confidential communications between lawyer and client for the purpose of litigation or legal advice, assuming that no waiver of privilege had occurred, and assuming the client desired the privilege to be asserted, it is clear that the estate settlement agreement and the retails of the Boswell audit could under no circumstances be deemed privileged since they were shared with an adversary of the client and in no way could be construed as "confidential communications." *United States* v. *Hodgson*, 492 F.2d 1175 (10th Cir. 1974); *United States* v. *Finley*, 434 F.2d 596 (5th Cir. 1970); *In re Semel*, 411 F.2d 195 (3d Cir.), *cert. denied*, 369 U.S. 905, 90 S.Ct. 220, 24 L.Ed.2d 181 (1969); *United States* v. *Bartone*, 400 F.2d 459, 461 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027, 89 S.Ct. 631, 21 L.Ed.2d 571 (1969); *United States* v. *Harrington*, 388 F.2d 520 (2d Cir. 1968); *NLRB* v. *Harvey*, 349 F.2d 900 (4th Cir. 1965); *United States* v. *McDonald*, 313 F.2d 832 (2d Cir. 1963); *Colton* v. *United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963); *McFee* v. *United States*, 206 F.2d 872 (9th Cir. 1953); *Pollock* v. *United States*, 202 F.2d 281 (5th Cir. 1953); *United States* v. *Long*, 328 F.Supp. 233 (E.D.Mo.1971); *United States* v. *Mellen*, 28 Am.Fed.Tax R.2d 71-5392 (N.D.Ga.1971); *United States* v. *Dickinson*, 308 F.Supp. 900 (D.Ariz.1969); *United States* v. *Berger*, 16 Am.Fed.Tax R.2d 5224 (S.D.Fla.1965); *In re*

Wasserman, 198 F.Supp. 564 (D.D.C.1961). *See also United States* v. *Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *Falsone* v. *United States*, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864, 74 S.Ct. 103, 98 L.Ed. 375 (1953). Accordingly, an order will be issued requiring Mr. McWilliams to appear before Special Agent Grant or his authorized representative to be sworn to testify and to produce for inspection and copying the estate settlement agreement.

[8] 9. With respect to the accounting workpapers generated by respondent Smith's preparation of the 1973 Hankins Lumber Company, Inc., federal corporate income tax return, the only evidence before the court is that Mr. Smith was an employee or officer of the corporation at the time of its preparation. Such workpapers are therefore not the personal books or records of Mr. Smith held in a personal or private capacity. *United States* v. *Shlom*, 420 F.2d 263 (2d Cir. 1969). They are rather corporate records which enjoy no privileged status and which are in the constructive possession of the corporation and its president, A. Burton Hankins, and in the actual possession of Mr. Smith in his representative capacity as an employee of the corporation. Accordingly, an order will be issued requiring the corporation, its president, A. Burton Hankins, and its employee, Robert Lewis Smith, to appear before Special Agent Grant or his authorized representative to produce the 1973 corporate federal income tax return workpapers.

[9, 10] 10. With respect to the records of the Estate of Bewel A. Hankins, it is clear that they were created and maintained in A. Burton Hankins' representative capacity as Executor of the Estate and cannot enjoy the protection of his personal privilege against self-incrimination. *United States* v. *Egenberg*, 443 F.2d 512 (3d Cir. 1971). *See also Bellis* v. *United States*, 417 U.S. 85, 94 S.Ct. 2179,

40 L.Ed.2d 678 (1974); *Grant* v. *United States,* 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed. 423 (1913); *Wheeler* v. *United States,* 226 U.S. 478, 33 S.Ct. 158, 57 L.Ed. 309 (1913); *United States* v. *Cobb,* 36 Am.Fed.Tax R.2d 75-5062 (6th Cir. 1975). Moreover, as records required to be created and maintained by the probate laws of Mississippi, they would not be entitled to the protection of Hankins' Fifth Amendment privilege. *Shapiro* v. *United States,* 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948); *United States* v. *San Juan,* 37 Am.Fed.Tax R.2d 76-810 (D.C.Vt.1975). The fact of the termination of the estate is immaterial since it is the nature of the records and not the status of the possessor or owner which controls. *Shapiro* v. *United States, supra; United States* v. *San Juan, supra.* Accordingly, an order will be issued requiring A. Burton Hankins to appear before Special Agent Grant or his authorized representative to produce all records of the Estate of Bewel A. Hankins.

[11] 11. With respect to the Boswell audit papers acquired by A. Burton Hankins from Attorney Tommy M. McWilliams, ostensibly in furtherance of the estate settlement agreement, the chronology of events described in the findings of fact above suggest that the taxpayer was embarked upon a course of action designed to obtain potential evidence against him before it fell into the hands of the Internal Revenue Service. Such third-party evidence obtained in such manner and for such purpose cannot be shielded from government inspection. *Fisher* v. *United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). The government's proof reflects that at the time of the settlement agreement in 1972 and at the time A. Burton Hankins sought possession of these records (and Mr. McWilliams agreed to their turnover) in March or April of 1974, Mr. Hankins was still the Executor of the Estate of Bewel A. Hankins. Respondent Hankins offered absolutely no evidence showing that he sought and obtained these records in any other capacity than as Executor of the Estate and the court concludes that they are records of the Estate acquired by Mr. Hankins in his representative capacity. For this reason they cannot be withheld on the basis of Mr. Hankins' personal privilege against self-incrimination. Accordingly, an order will be issued requiring A. Burton Hankins to appear before Special Agent Grant or his authorized representative to produce all books, records, and papers delivered to him by attorney Tommy M. McWilliams in connection with the settlement of the will contest.

[12, 13] 12. With respect to the books and records of the Hankins Lumber Company partnership, the evidence shows that the company was a large, many-faceted commercial venture of long duration, with numerous employees, substantial assets, and impressive gross receipts. Its interrelationship in the lumber business with two substantial closely held corporations (each owned jointly by the same partners) reflects the structured and organized nature of the business. The incorporation of the successor corporation within months of the termination of the partnership by the death of Bewel A. Hankins emphasizes the continuity and organized nature of the business. Based upon the foregoing the court concludes that the Hankins Lumber Company was not the "small family partnership" envisioned by the dictum in the Supreme Court's decision in *Bellis* v. *United States,* 417 U.S. 85 at 101, 94 S.Ct. 2179 (1974), which the court said *might* have dictated a different result, *i. e.,* permitted invocation of a former partner's privilege against self-incrimination to bar compelled production of the records of the former partnership. *Accord, United States* v. *Cobb,* 36 Am.Fed.Tax R.2d 75-5062 (6th Cir. 1975) (two and three member law partnerships);

United States v. *Mahady & Mahady*, 512 F.2d 521 (3d Cir. 1974) (four brother law partnership). The partnership records do not, of course, lose that characteristic because of the termination of the partnership. *Bellis* v. *United States, supra; Grant* v. *United States*, 227 U.S. 74, 33 S.Ct. 190, 57 L.Ed. 423 (1913); *Wheeler* v. *United States*, 226 U.S. 478 (1913). Thus, A. Burton Hankins' personal privilege against self-incrimination is not available to bar production of the partnership records. Accordingly, an order will be issued requiring A. Burton Hankins to appear before Special Agent Grant or his authorized representative to produce the books and records of the Hankins Lumber Company partnership.

Petitioners' attorneys may submit to the court for entry within 10 days appropriate orders to give effect to the decision of the court contained herein.

APPENDIX D

ORDER

This cause coming on for a hearing on this date pursuant to this court's order to A. Burton Hankins to show cause why he should not be held in contempt for failing to comply with this court's previous orders of August 10, 1976;

The court, having heard testimony in open court, argument of counsel, and being further fully advised in the premises;

The court finds as follows:

(1) That, upon the pleadings and the testimony and the evidence presented, the United States has established a prima facia case of contempt of this court by respondent A. Burton Hankins;

(2) That respondent A. Burton Hankins has failed to show cause why he should not be held in contempt of this court's orders of August 10, 1976;

IT IS THEREFORE ORDERED AND ADJUDGED that respondent A. Burton Hankins is hereby committed to the custody of the Attorney General of the United States, or his authorized representative, until such time as he purge himself of his contempt or until further order of this court;

IT IS FURTHER ORDERED AND ADJUDGED, provided an appeal is taken from the above order, that the commitment of respondent A. Burton Hankins is stayed until Noon on Wednesday, June 1, 1977, unless the Fifth

Circuit Court of Appeals or higher authority grants a stay of execution of this order of commitment.

This 29th day of April, 1977.

/s/ Orma R. Smith
United States District Judge

No. 78-806

In the Supreme Court of the United States

OCTOBER TERM, 1978

A. BURTON HANKINS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-806

A. BURTON HANKINS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A41-A62) is reported at 424 F. Supp. 606. The opinion of the court of appeals (Pet. App. A1-A20) and its clarifying opinion denying a petition for rehearing (Pet. App. A21-A40) are respectively reported at 565 F.2d 1344 and 581 F.2d 431.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1978, and the court denied rehearing

on October 3, 1978 (Pet. 2). The petition for a writ of certiorari was filed on November 15, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compulsory self-incrimination bars enforcement of an internal revenue summons requiring production of records held by a person in the representative capacities of a partner in a partnership and an executor of an estate.

2. Whether the decision below correctly held petitioner in contempt for refusing to obey an order enforcing an internal revenue summons requiring production of records that petitioner acknowledged were in his possession.

STATEMENT

In 1957, petitioner and his brother formed a partnership known as Hankins Lumber Company. The partnership continued until the death of petitioner's brother in 1971. The business was thereafter continued and incorporated in 1973. In 1975, the Internal Revenue Service issued summonses to petitioner requiring the production of the books and records of Hankins Lumber Company, records relating to the administration of the estate of petitioner's brother, and an audit report of the Hankins Lumber Company and associated workpapers prepared by a certified public accountant for the widow of petitioner's brother for use in a will contest. Petitioner refused to comply

with the summonses on the ground that his Fifth Amendment privilege against compulsory self-incrimination barred production of the records. In this enforcement proceeding brought by the government in the United States District Court for the Northern District of Mississippi, petitioner took the position that the records sought by the summonses were his personal property and that he and he alone had custody and control of the records summoned (I-R. 23, 24, 35, 339, 340, 392).[1] At the hearing in the district court, petitioner's counsel acknowledged that petitioner was in possession and control of all the records (I-R. 59).[2]

The district court found that all of the records sought by the summonses were either created by or obtained by petitioner in a representative capacity—either as a partner in the lumber company or as executor of his brother's estate. It accordingly rejected petitioner's Fifth Amendment claim (Pet. App. A48, A59-A62). The court entered final orders of enforcement on August 11, 1976, and both the district court and the court of appeals denied stays pending appeal. On September 27, 1976, petitioner produced

---

[1] "I-R." refers to the record appendix filed in the court of appeals relating to the internal revenue summonses. "II-R." refers to the record appendix filed in the court of appeals relating to the order holding petitioner in contempt.

[2] As to corporate workpapers also summoned and in the possession of petitioner's accountant, petitioner asserted under oath that he was not in possession of those papers (I-R. 338). Accordingly, no further attempt was made to obtain those papers from petitioner.

certain ledgers and journals of the Hankins Lumber Company. However, examination of those books revealed that certain critical pages of the sequentially numbered books had been removed and were not produced. Petitioner also produced what purported to be the "Boswell audit papers" and the records of the estate of petitioner's brother. But examination of those records likewise revealed that they did not contain the requested audit reports or workpapers, and that the estate administration file contained only copies of records already on file with the chancery (probate) court (II-R. 60-71).

The government thereupon sought an order from the district court compelling petitioner to show cause why he should not be held in contempt for refusing to comply with the court's order of August 11, 1976. In its petition, the government described in detail the records not produced by petitioner. In response, petitioner claimed that he was unable to produce the records.[3] At the return of the show cause order, the government established that the court had ordered petitioner to produce the records, that petitioner had not produced all the records, and that petitioner had offered no justification for his refusal to produce the records. The government showed that the pages missing from the books of Hankins Lumber Company were not random pages, but had been systematically removed from the books so as to make the pages produced useless (II-R. 69-70).

[3] Unlike his responses to the petition to enforce the summonses, petitioner's response to the government's petition for contempt was not verified under oath (II-R. 29).

Petitioner presented no defense nor any evidence attempting to show cause why he should not be held in contempt.[4] After observing that it was "inconceivable" that petitioner did not have possession of and control over the records, the district court held petitioner in contempt and ordered him incarcerated until such time as he produced the records (II-R. 101, 35).

The court of appeals affirmed as to the summons enforcement and contempt orders (Pet. App. A1-A40). In its first opinion (Pet. App. A1-A20), the court rejected petitioner's Fifth Amendment claim (Pet. App. A10-A15). It also upheld the contempt order on the ground that there was no evidence to support petitioner's contention that he could not produce the records (Pet. App. A18-A19).[5]

[4] Petitioner did offer to take the stand in order to assert that he could not produce the records if he were not subjected to cross-examination. The court ruled, however, that petitioner would be subject to cross-examination if he elected to testify. Petitioner thereupon declined to take the stand (II-R. 84-86).

[5] In its supplemental opinion issued upon the denial of a petition for rehearing, the court of appeals reaffirmed its earlier decision (Pet. App. A21-A40). Following an extensive examination of Mississippi law (Pet. App. A26-A34), the court of appeals again concluded (Pet. App. A34) that the records of the lumber company were not petitioner's personal papers but the papers of a partnership held by petitioner in a representative capacity. The court also reaffirmed (Pet. App. A34-A36) its earlier ruling that the district court properly held petitioner in contempt.

ARGUMENT

1. Petitioner argues (Pet. 20-21) that a revenue agent and a government attorney stated that Hankins Lumber Company was operated as a sole proprietorship during 1972, and that the summons should not have been enforced with respect to the records for that year. But, contrary to petitioner's assertion, the statements he cites do not constitute a concession by the government that the court of appeals was required to accept. They are at best isolated statements that do not govern the proper legal characterization of Hankins Lumber Company in 1972.[6] With respect to that question, the court of appeals correctly held (Pet. App. A12-A13, A26-A34) that during 1972, petitioner continued to operate the business and hold the records sought in the representative capacities of guardian for his brother's minor children and executor of his brother's estate. Moreover, the court concluded that the partnership did not terminate until he, the surviving partner, made an

[6] While the revenue agent characterized Hankins Lumber Company as a sole proprietorship in 1972 (I-R. 167; II-R. 122), petitioner errs in describing the government's trial attorney's statement as a concession. The full statement, which petitioner quotes only in part, was "Then when Bewel Hankins dies the partnership of course, by the operation of law, I suppose, becomes a sole proprietorship. But to further complicate the matter Mr. Burton Hankins becomes the Executor of his brother's estate and then acquires the remaining assets of the partnership" (I-R. 68).

accounting to the estate and to the heirs under Mississippi law.[7] This question, which turns largely upon state law, does not warrant further review.

2. Contrary to petitioner's further argument (Pet. 24), his legal right to possession of the papers does not establish that they are his personal records protected from compulsory disclosure. This Court rejected the identical argument both in *Couch* v. *United States*, 409 U.S. 322 (1973), and in *Bellis* v. *United States*, 417 U.S. 85 (1974). Moreover, the fact that the partnership in *Bellis* was only in the process of winding up its affairs when the subpoena was served while the partnership here was completely dissolved does not, as petitioner asserts (Pet. 23), serve to distinguish that case. As the Court in *Bellis* observed (417 U.S. at 96 & n.3), the dissolution of a partnership does not give the custodian of its records any greater claim to the Fifth Amendment privilege. The critical fact is that the records in question are

[7] Petitioner further errs in contending (Pet. 21) that the government conceded on appeal that Hankins Lumber Company was a sole proprietorship in 1972. The government's brief, which petitioner again quotes only selectively, stated as follows (*id.* at 51):

> While the business was not technically being operated as a "partnership" in 1972, it was certainly not run as a sole proprietorship, but rather, was being operated by Hankins, at least in part, for the benefit of the estate and the children. With Hankins wearing so many hats, it is clear that he was operating the business in a representative capacity, as a fiduciary with responsibilities not unlike those of a trustee; and a trustee, acting in a representative capacity, has no Fifth Amendment rights in the books and records of the entity which he administers.

partnership and not personal records. See *Wheeler* v. *United States*, 226 U.S. 478 (1913); *Grant* v. *United States*, 227 U.S. 74 (1913). Accord: *United States* v. *Mahady & Mahady*, 512 F.2d 521 (3d Cir. 1975); *United States* v. *Silverstein*, 314 F.2d 789 (2d Cir. 1963).

Petitioner alternatively contends (Pet. 22) that even if the records in question are properly considered to be partnership records,[8] they should nevertheless be protected by his Fifth Amendment privilege because Hankins Lumber Company was a "small family partnership." In support of this argument, petitioner relies upon the Court's dictum in *Bellis* (417 U.S. at 101) that "This might be a different case if it involved a small family partnership * * *," citing *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D. N.Y. 1972). But the *Slutsky* decision turned on the particularized facts that the two-brother partnership involved in that case conducted a family resort business and each of the family members empowered to sign checks lived on the resort premises. In these circumstances, the court concluded that the partnership represented "the purely private or personal interests of its constituents" (352 F. Supp. at 1108). Here, however, petitioner has made no showing that would assimilate Hankins Lumber Company to the close family enterprise involved in *Slutsky*.

[8] *United States* v. *Plesons*, 560 F.2d 890, 893 (8th Cir. 1977), and *United States* v. *Helina*, 549 F.2d 713, 716-717 (9th Cir. 1977), upon which petitioner relies (Pet. 20), are distinguishable since neither case involved partnership records or documents held in a representative capacity.

At all events, as this Court subsequently stated in *Fisher* v. *United States*, 425 U.S. 391, 408 (1976), upon which the court of appeals relied (Pet. App. A12), the general rule is that "neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds [citing *Bellis*]." Accordingly, the continuing validity of the decision in *Slutsky* itself is not free from doubt, and there is no need for this Court to consider whether the rationale of that decision should be extended beyond its peculiar facts. See also *United States* v. *Mahady & Mahady*, *supra*; *United States* v. *Greenleaf*, 546 F.2d 123 (5th Cir. 1977).[9]

4. As for the order of contempt, petitioner asserts (Pet. 14-19) that the government failed to establish his contempt by clear and convincing proof or that he had the ability to comply with the court's order. But the conclusion of both courts below was that petitioner could comply with the order of the district court but refused to do so. Moreover, in a contempt proceeding, the government only has the burden of

[9] Petitioner also argues (Pet. 24-25) that the mere act of producing the papers will admit their existence and authenticate them and thus constitute a testimonial act. But it is well established that production of records held in a representative capacity is not protected by the Fifth Amendment. *Curcio* v. *United States*, 354 U.S. 118 (1957); *Fisher* v. *United States*, *supra*. As the Court noted in *Fisher* (425 U.S. at 409-414), the compelled production of records which, as here, can be authenticated by others does not involve testimonial compulsion. See also, *United States* v. *Beattie*, 522 F.2d 267, 276 (2d Cir. 1975), cert. denied on this issue, 425 U.S. 970 (1976).

proving a reasonable basis for belief that the alleged contemnor has the ability to comply and that he failed to comply with the production order. *McPhaul* v. *United States*, 364 U.S. 372, 376 (1960); *United States* v. *Fleischman*, 339 U.S. 349, 362-363 (1950); *United States* v. *Hansen Niederhauser Co.*, 522 F.2d 1037 (10th Cir. 1975); *NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973); *Angiulo* v. *Mullins*, 338 F.2d 820, 822 (1st Cir. 1964). Once that showing is made, the burden shifts to the contemnor to "present some evidence to explain or justify his refusal" to comply. *McPhaul*, *supra*, 364 U.S. at 379 (citing *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934)); *United States* v. *Bryan*, 339 U.S. 323, 330-331 (1950); *Hodgson* v. *Hotard*, 436 F.2d 1110, 1114 (5th Cir. 1971); *Angiulo* v. *Mullins*, *supra*.

Here, the government met its burden by pointing to the previous production order and the district court's finding that petitioner was in possession of the records sought, and introducing testimony that the records were not produced less than one month after that order and findings were entered. The government further showed that petitioner had offered no explanation for failing to produce and that the records removed from the books of account were systematically removed in such a manner as to render the records produced "gibberish" from an accounting standpoint. In response to this proof, petitioner presented no evidence.

Thus, petitioner did not even establish an inability to comply with the production order, much less make the requisite showing that his conduct did not give rise to that inability and that he had made "in good faith all reasonable efforts to comply." *United States* v. *Ryan*, 402 U.S. 530, 534 (1971); *United States* v. *Bryan*, *supra*, 339 U.S. at 330-331; *United States* v. *Swingline, Inc.*, 371 F. Supp. 37, 45 (E.D. N.Y. 1974).[10]

---

[10] Petitioner further asserts (Pet. 14-15) that the district court erred in refusing to permit him to take the stand and testify that he was unable to comply with the production order and then rely on his privilege against self-incrimination to preclude cross-examination. Petitioner failed, however, to demonstrate that he could make the requisite showing only by his own testimony or that he could not, in fact, produce the records sought.

Petitioner's reliance (Pet. 11, 13) upon *Curcio* v. *United States*, 354 U.S. 118, 128 (1957); *Traub* v. *United States*, 232 F.2d 43 (D.C. Cir. 1955); and *United States* v. *Patterson*, 219 F.2d 659 (2d Cir. 1955), is misplaced. In those cases, the government called the party claiming the benefits of the privilege against self-incrimination as a witness before either a grand jury or a congressional committee, and in each instance, the order holding that party in contempt for failing to answer questions asked by the questioning authority was reversed. Here, the government did not call petitioner as a witness, and there was no requirement that it do so. The ruling of the district court as to which petitioner complains (Pet. 14-15)—that petitioner, if he voluntarily testified, would have waived the privilege as to those matters testified to on direct examination—is consistent with the established rule that any witness who voluntarily takes the stand on his own behalf waives the privilege as to relevant questions asked on cross-examination. See, *e.g.*, *Brown* v. *United States*, 356 U.S. 148, 154-156 (1958); *United States* v. *Worth*, 505 F.2d 1206 (10th Cir. 1974), cert. denied, 420 U.S. 964 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

JANUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 284519 270

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-806

A. BURTON HANKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITIONER'S REPLY BRIEF

PAUL P. LIPTON
LIPTON & PETRIE, LTD.
625 North Milwaukee Street
Milwaukee, Wisconsin 53202

L. ARNOLD PYLE
WATKINS, PYLE, LUDLAM, WINTER & STENNIS
Post Office Box 427
Jackson, Mississippi 39201

JAMES S. NIPPES
DOSSETT, MAGRUDER AND MONTGOMERY
1300 Deposit Guaranty Plaza
Jackson, Mississippi 39201
Counsel for the Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISION

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-806

A. BURTON HANKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITIONER'S REPLY BRIEF

The Brief for the Respondents in Opposition substantially ignores the significant Fifth Amendment argument that makes the "contempt" issue imperative for review upon certiorari. The "Questions Presented", as set forth in the Government's brief, ignore completely the most important issues and the brief itself exemplifies the age-old technique of sublimating those matters which the brief-writer cannot answer adequately.

By the simple expedient of compelling a criminal target to explain non-production of portions of records summoned by the IRS, that prospective defendant (who already has signed an agreement extending the statute of limitations on criminal prosecution) is being incarcerated for asserting his rights under the Fifth Amendment. The decisions of this Court simply do not justify the coercive incarceration of a criminal target who is faced with the Hobson's choice of self-incrimination or imprisonment for failure to explain the non-production of records pursuant to an administrative subpoena.

It is inconceivable that the petitioner in this case has fewer rights than a witness responding to a grand jury subpoena, as the Government suggests. (Brief 11, n. 10) In *Curcio* v. *United States*, 354 U.S. 118 (1957), this Court rejected out of hand the Government's argument that a custodian must explain or account under oath for the non-production of documents in order to comply with a subpoena. The Court stated that the custodian "cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." (354 U.S. 124)

At the very least, the District Court should have afforded petitioner a non-incriminatory opportunity to testify *in camera*, subject to full cross-examination by that Court. Compare *United States* v. *Anderson*, 567 F. 2d 839 (8th Cir. 1977). The Government's opposition brief makes no attempt to answer this contention.

In a misguided attempt to shift the burden of proof to petitioner, the Government relies principally on two decisions of this Court (*McPhaul* and *Fleischman*), which were not even cited in either opinion of the Court of Appeals. Both cases are readily distinguishable and will be discussed below.[1]

In the cases relied upon by the Government the records sought by subpoena *duces tecum* were not privileged under the Fifth Amendment, though frivolous privilege claims

1. *McPhaul* v. *United States*, 364 U.S. 372 (1960); *United States* v. *Fleischman*, 339 U.S. 349 (1950). It may be appropriate to note, moreover, that both cases involved subpoenas issued by a Subcommittee investigating un-American activities. Both were decided by five to four margins. Neither case has been squarely challenged or deeply analyzed in any subsequent decision of this Court or any appellate court. The result in the cited cases may reflect, in part, the philosophy of an earlier controversial era.

were raised in some of the lower court decisions. In the instant case, however, the Justice Department attorney conceded in the District Court that the availability of the Fifth Amendment privilege with respect to the records of the two-brother partnership was "clearly a close question of law." (App. I, 70) With regard to the Boswell workpapers the Government admitted (App. I, 64, 66) that any records held by Hankins were privileged under the then controlling opinion of the Fifth Circuit in *United States* v. *Kasmir*, 499 F. 2d 444 (5th Cir. 1974), *rev'd sub nom. Fisher* v. *United States*, 425 U.S. 391 (1976).

Because there were valid legal objections to production of any records, petitioner's counsel justifiably urged the District Court to hold in abeyance the question "whether all the records which have been summoned are in existence." (App. I, 58) Neither the District Court, nor Government counsel, took issue with counsel's position that the issue of "ability to produce" was premature. (App. I, 58-59)

The position taken by petitioner's counsel is supported by cases cited at page 16 of the Petition for Certiorari. Moreover, this was precisely the argument previously advanced by the Government in *United States* v. *Held*, 435 F. 2d 1361 (6th Cir. 1970). There the Government's brief on appeal asserted: (page 58)

> ". . . if some showing of compliance having been made, the question ultimately arises on a contempt citation whether Mr. Held has produced records to the full extent of his ability, it will then and not before be timely to consider whether the evidence then adduced does or does not support such a defence."

Unlike *McPhaul*, the instant case does not involve a failure to produce *any* records following an unqualified, unexplained refusal to produce when requested to do so.

Hankins' answer to the petition seeking enforcement of the summons for the production of the former partnership records contained an *unqualified denial* that he had "possession, custody or control of much of the record material" sought by the IRS summons. (App. I, 338) His verified answer to the petition calling for the production of "estate" records contained an *unqualified denial* that he had possession of any documents pertaining to the estate tax return and settlement of the estate. (App. I, 381, 389)

It simply is not true that petitioner's counsel acknowledged at the enforcement hearing that petitioner was in possession and control of all the records. (Respondent's Brief in Opposition, p. 3) This assertion is based on an inaccurate finding of fact requested by the Government and adopted verbatim by the District Court before a transcript was filed. Counsel admitted only that petitioner had possession of such records *as were in existence when the summonses were served.* (App. I, 59) Because petitioner never denied that he could produce *some records,* the issue should have been reserved for the contempt hearing.[2]

Not only did this petitioner deny ability to comply fully at the enforcement hearing and in the verified pleadings filed therein, *his response to the contempt petition affirmatively asserted that he was unable* "to produce any of the records described as 'missing' " in the Government's pleadings. (App. II, 28) Previously, counsel had unsuccessfully urged the Government to compel the personal appearance of Hankins, as ordered by the District Court. (App. I, 309, 343, 372, 403) Thus, Hankins was precluded from an opportunity to deny ability to produce and to assert

2. With the exception of the 1972 records, which the Government had conceded to be those of a proprietorship, all available documents were in fact produced in response to the enforcement orders.

his Fifth Amendment privilege upon cross-examination, as he was entitled to do under *Curcio* v. *United States,* 354 U.S. 118, 128 (1957); *United States* v. *Patterson,* 219 F. 2d 679 (2nd Cir. 1955); and *Securities Investor Protection Corp.* v. *Executive Securities Corp.,* 433 F. Supp. 474 (S.D. N.Y. 1977).

It is not true, as the Government asserts, that both courts below concluded that "petitioner could comply with" the court's order. (Opposition Brief, p. 9) At the conclusion of the contempt hearing, an Assistant U. S. Attorney requested that the contempt order recite that "the respondent Hankins is in a position to produce the records that are missing." To this, Judge Smith merely replied: (App. II, 107)

> "Well, I just hold that I have previously held that he was in possession of these records in former hearings of this case and that under those conditions, if he does not have the records at this time to produce, it is incumbent upon him to show that."

Previously, the District Court had said, "I just cannot take the unsworn testimony of Mr. Hankins through his attorney that he can't produce them." (App. II, 101) In both opinions, the Court of Appeals merely emphasized the failure of Hankins to present any evidence of his inability to comply.

If petitioner had attached an affidavit, denying ability to produce, to his motion to dismiss the contempt petition the Government would have contended that petitioner had waived his Fifth Amendment privilege. This argument was made by the Government, and rejected by the District Court, in *Groh* v. *Decker,* 72-1 U.S.T.C. ¶ 9410 at pp. 84,408-9 (W.D. Mich. 1971). However, this questionable position subsequently was accepted by the District Court

for the Southern District of New York in an unreported opinion, now on appeal in *United States* v. *O'Henry's Filmworks, Inc., et al.*, 2nd Cir., Dkt. No. 78-6124.

In *O'Henry*, which is scheduled for oral argument on January 26, 1979, the respondent attached an affidavit to his response to the enforcement petition stating:

> "I am not now, nor was I at the time I was served . . . in possession or in control of the documents called for in the summons." (Appellant's Brief, p. 5)

In attempting to support the District Court's ruling that the affidavit was a waiver of the privilege, the Government has filed a brief basically in conflict with its opposition brief in the instant case. For example, the Government's *O'Henry* brief states that this Court in *McPhaul* "simply was emphasizing that an individual cannot treat a Congressional subpoena as an invitation to play 'hare and hounds' by withholding a legitimate explanation for this action until years later, when he is tried for criminal contempt." (p. 23)

McPhaul had been indicted and convicted of the offense of willful failure to comply with a subpoena *duces tecum* of the House of Representatives. When questioned at a Subcommittee hearing, McPhaul gave a flat "I will not" response when asked whether or not he would produce the records. (364 U.S. at 376) In affirming McPhaul's conviction, this Court emphasized that the defendant "never claimed—either before the Subcommittee, the District Court, or the Court of Appeals and he does not claim here—that the records called for by the subpoena did not exist or that they were not in his possession or subject to his control." (364 U.S. at 378)

Because McPhaul never claimed inability to produce, this Court rejected the argument that "the government

failed to show he could have produced the records before this Subcommittee." (364 U.S. at 378) In essence, the case merely holds that the Government need not negative every conceivable defense to production of records that might have been, but in fact was not, raised.

In *United States* v. *Fleischman*, 339 U.S. 349 (1950), the Government had proved beyond a reasonable doubt that the witness had the power jointly with others, if not individually, to bring about compliance with the subpoena. Mrs. Fleischman did not even suggest that she would give her consent to production, or attempt to obtain the consent of the other board members.

The critical factor in *McPhaul*, as the Court below had noted in an earlier case, *United States* v. *Rizzo*, 539 F. 2d 458, 466-467 (5th Cir. 1976), was McPhaul's "failure even to suggest to the Subcommittee his inability to produce" the records in question. (364 U.S. at 379) *McPhaul* plainly indicates that a *mere suggestion* of inability to comply would "put the government to proof on that matter" at a "later contempt trial for failure to produce he records." (364 U.S. at 380)

This Court's concluding comment with respect to the "ability to produce" issue in *McPhaul* was as follows: (364 U.S. at 380-381)

> "Inasmuch as petitioner *neither advised the Subcommittee that he was unable to produce the records nor attempted to introduce any evidence at his contempt trial of his inability to produce them*, we hold that the trial court was justified in concluding and in charging the jury that the records called for by the subpoena were in existence and under petitioner's control at the time the subpoena was served upon him." (Emphasis added)

This statement reflects the precise holding in *McPhaul* and effectively serves to distinguish the instant case. Indeed, a fair reading of *McPhaul* serves to reinforce petitioner's position that, in a contempt proceeding, the government must shoulder its burden of proving ability to produce by clear and convincing evidence.

Assuming that a contempt finding was appropriate, the Government points to no evidence justifying coercive incarceration, rather than a remedial, compensatory award. In opposing Hankins' motion to dismiss the contempt petition, the Government filed a memorandum *conceding* that it "could offer no proof that Hankins is still in possession" of any "missing" records. (Memorandum in Opposition, p. 5, R. 55; Dkt. No. 77-1967) In the face of this concession, the incarceration order is totally lacking in support.

Moreover, the courts below erred in failing to give appropriate weight to petitioner's denial under oath in verified pleadings in the enforcement action that he was able to produce all of the records, and the Court of Appeals should have taken cognizance of petitioner's sworn denial in the affidavit attached to his Motion for Stay Pending Appeal. See *Hynes* v. *Sloma*, 59 A.D. 2d 1014, 399 N.Y.S. 2d 745, 747 (4th Dept. 1977).

In the Court of Appeals, the Government asserted that incarceration was appropriate, even if the records could not be produced, in order to compel Hankins to "explain his inability to produce." (Appellee's Brief, Dkt. No. 77-1967, p. 46, heading "C") Thus, the Government erroneously argued and the court below apparently agreed that incarceration is appropriate to coerce oral testimony, and not merely to coerce the production of records.

The Government's brief (p. 6) misleadingly characterizes "as isolated statements" the concessions in the District Court that the 1972 records were those of a sole proprietorship. Inspection of the summons as a whole discloses that the Government was demanding only documents for periods ending with the death of Bewell Hankins. (App. I, 475) A review of the District Court's Findings of Fact and Conclusions of Law makes it abundantly clear that the Court intended only to compel production of records prior to termination of the partnership, together with the workpapers for the period ended November 21, 1971. (App. I, 278-279, 295-296)

It is undisputed that petitioner did not produce the 1972 records in response to the court's order. Failure to produce these records was vindicated when the IRS made no subsequent demand for production of the same. The Department of Justice *concurred in this view* when it failed to cite petitioner for contempt with respect to the 1972 records. Finally, the Government conveniently overlooks the fact that the income tax deficiency for 1972 was directed solely to Hankins as sole owner and was computed by using beginning and ending assets of the lumber company business. (App. II, 118, 123, 162)

With respect to the remaining issues in the underlying appeal from the enforcement order, the Government's brief ignores the emphasis in *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976), on the fact that "existence and possession or control of the subpoenaed documents" was not in issue. Here, possession and existence were disputed and Hankins contended that he was not holding any records in a representative capacity. For these reasons, *Fisher* is not controlling and enforcement of the summonses in

this case clearly would involve incriminating testimonial admissions.

For the foregoing reasons and those previously advanced, this Court should grant the Petition for Certiorari. Moreover, petitioner suggests that this matter may warrant a request that the entire record be transmitted to the Supreme Court before action is taken on this Petition.

Respectfully submitted,

PAUL P. LIPTON
LIPTON & PETRIE, LTD.
625 North Milwaukee Street
Milwaukee, Wisconsin 53202

L. ARNOLD PYLE
WATKINS, PYLE, LUDLAM, WINTER & STENNIS
Post Office Box 427
Jackson, Mississippi 39201

JAMES S. NIPPES
DOSSETT, MAGRUDER AND MONTGOMERY
1800 Deposit Guaranty Plaza
Jackson, Mississippi 39201
Counsel for the Petitioner